

BIENNIAL REPORT
of the
ATTORNEY GENERAL
STATE OF FLORIDA

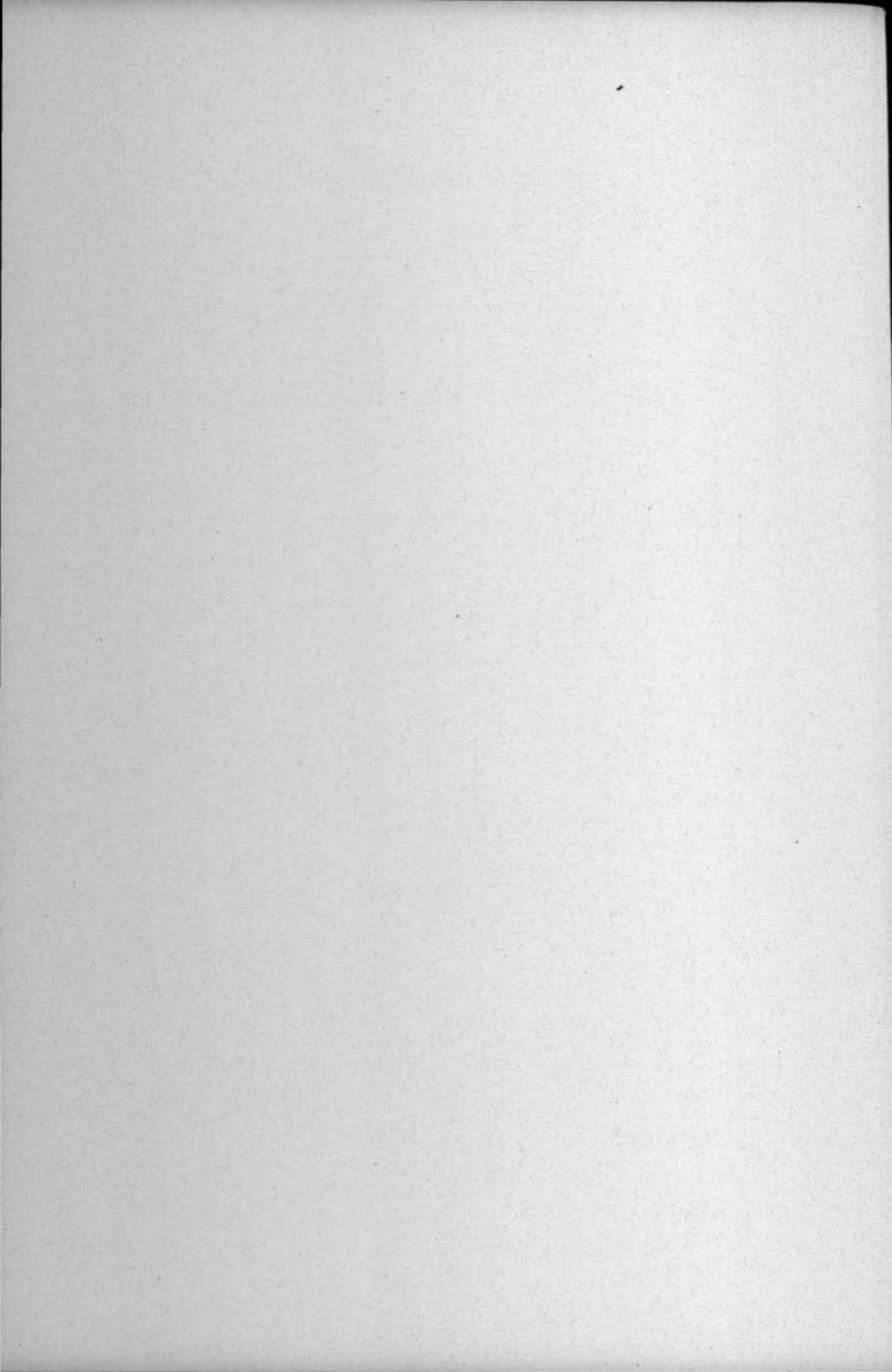
From January 1, 1961, through December 31, 1962

RICHARD W. ERVIN
Attorney General



Tallahassee, Florida
1963







STATE OF FLORIDA
OFFICE OF THE
ATTORNEY GENERAL
TALLAHASSEE

RICHARD W. ERVIN
ATTORNEY GENERAL

January 3, 1963

LETTER OF TRANSMITTAL

TO HIS EXCELLENCY
HONORABLE C. FARRIS BRYANT
GOVERNOR OF FLORIDA

SIR:

I have the honor of submitting to you my Biennial Report of the two preceding years from January 1, 1961 through December 31, 1962. This report is submitted as required by the constitutional mandate directing each officer of the Executive Department to make a full report of the official acts of his office, and of the requirements of same, to the Governor at the beginning of each regular session of the legislature or whenever the Governor shall require a report.

This report includes opinions of general interest rendered during two calendar years, a listing of former Attorneys General, constitutional amendments adopted by the legislature in 1961 and ratified at the general election in 1962, the constitutional and statutory duties of the Attorney General and the personnel of my office during the past two years. Opinions are numbered numerically as released and identified by the year and number beginning with opinion No. 1 as "61-1."

Statutes and constitutional sections cited and subject index may be found in the last portion of the report.

Respectfully submitted,
RICHARD W. ERVIN
ATTORNEY GENERAL

ATTORNEYS GENERAL OF FLORIDA

SINCE 1845

JOSEPH BRANCH	1845-1846
AUGUSTUS E. MAXWELL	1846-1848
JAMES T. ARCHER	1848-1848
DAVID P. HOGUE	1848-1853
MARIANO D. PAPY	1853-1860
JOHN B. GALBRAITH	1860-1868
JAMES D. WESTCOTT, JR.	1868-1868
A. R. MEEK	1868-1870
SHERMAN CONANT	1870-1870
J. P. C. DREW	1870-1872
H. BISBEE, JR.	1872-1872
J. P. C. EMMONS	1872-1873
WILLIAM A. COCKE	1873-1877
GEORGE P. RANEY	1877-1885
C. M. COOPER	1885-1889
WILLIAM B. LAMAR	1889-1903
JAMES B. WHITFIELD	1903-1904
W. H. ELLIS	1904-1909
PARK TRAMMELL	1909-1913
THOMAS F. WEST	1913-1917
VAN C. SWEARINGEN	1917-1921
RIVERS BUFORD	1921-1925
J. B. JOHNSON	1925-1927
FRED H. DAVIS	1927-1931
CARY D. LANDIS	1931-1938
GEORGE COUPER GIBBS	1938-1941
J. TOM WATSON	1941-1949
RICHARD W. ERVIN	1949-

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ORGANIZATION OF ATTORNEY GENERAL'S OFFICE

CAPITOL, TALLAHASSEE

RICHARD W. ERVIN

ATTORNEY GENERAL

J. ROBERT McCLURE

FIRST ASSISTANT

December 1962

Office Management

Personnel

Finance

Council of State Governments

Secretaries

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JACK A. HARNETT

Comptroller
Governor
Homestead Exemption
Licenses
Retirement
Tax Assessors
Tax Collectors
Tax Questions

ROBERT J. KELLY
PHIL KNIGHT

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Circuit Clerks
County Clerks
County Commissioners
County Judges
Insurance Commissioner
Sheriffs
Treasurer

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WILTON MILLER

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Atlantic States Marine Fisheries
Commission
Citrus Commission
Conservation Department
Dental Board
Department of Public Safety
Development Commission
Flood Control
Game & Fish Commission
Labor Relations
Land, Oil, Gas and Water
Market Board
Motor Vehicle Commission
Soil Conservation
State Road Department
Tuberculosis Board
Water Resources
Weights Division, SRD
Medical Board
Milk Commission

RALPH E. ODUM

Board of Control
Board of Education
County School Boards
Department of Education
Educational TV Commission
Florida Nuclear Development
Commission
Teachers' Retirement
Council for Blind

ROBERT PARKER

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Drainage Districts
Everglades Fire Control
Forestry Board
Indian Affairs
Land Foreclosure
Land Office
Park Board
Purchasing Commission
Trustees of Internal Improvement
Fund
Turnpike Authority

GERALD MAGER

Board of Administration
Budget Commission
Chiropractic Board
Commissioners of State Institutions
Contracts, Building
Division of Corrections
Financial Responsibility
Fire Marshal
Industrial Commission
Merit System
Osteopaths
Psychology Examiners
Barber Board

WILSON W. WRIGHT

Armory Board
Aviation
Civil Defense
Constables
Corporations
Elections
Justice of Peace
Military Affairs
Municipalities
Notaries Public
Secretary of State
Small Claims Courts
Veterans Affairs

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Real Estate Commission
Securities Commission
Litigation

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RALPH E. ODUM

SAM SPECTOR

Alcoholic Rehabilitation Board
Egg Commission
Engineers
Escheatments
Funeral Directors
Marriage and Divorce
State Hospitals
Pest Control
Watchmakers Commission

MARY SCHULMAN
Accountancy Board
Air Pollution Control
Anatomical Board
Architects
Beauty Board
Board of Health
Children's Commission
Chiropody Board
Crippled Children's Commission
Dispensing Opticians
Harbor Masters
Juvenile Courts
Library Board
Massage Board
Medical Technology Board

Mosquito Control
Naturopathic Board
Nurses
Nursing Homes and Hospitals
Optometrist Board
Physical Therapists
Pilot Commission
Veterinary Board
Welfare Board

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General Litigation

¹ The Lakeland and ² Miami offices deal exclusively with Criminal Appeals. Any inquiry concerning other matters should be addressed to the Attorney General at the Tallahassee office in the Capitol.

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 JAMES G. MAHORNER
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County Solicitors
Criminal Appeals
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Habeas Corpus
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Parole Commission
Prosecuting Attorneys
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 ROSE D. KITCHEN

Biennial Report
Bill Drafting
Bulletins
Council of State Governments
House and Senate Journals
Index and Tables
Publication of Official Florida Statutes

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 JOHN BITOFF

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Narcotics
Pharmacy Board
Racing Commission
Railroad and Public Utilities Commission

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REEVES BOWEN (Chief of Criminal Appeals Division)	Assistant
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JUNE DAVIS	Secretary
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ED McCOLLUM	Investigator
KENNETH SKOTTEGARD	Investigator
*CARL WILSON	Investigator
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DAN J. STARKS	Janitor
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RUTH N. LANDERS	Maid

*Resigned

**Retired

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SALLYE C. FLOURNOY	Editor, Assistant
ROSE D. KITCHEN	Indexer, Editor, Assistant

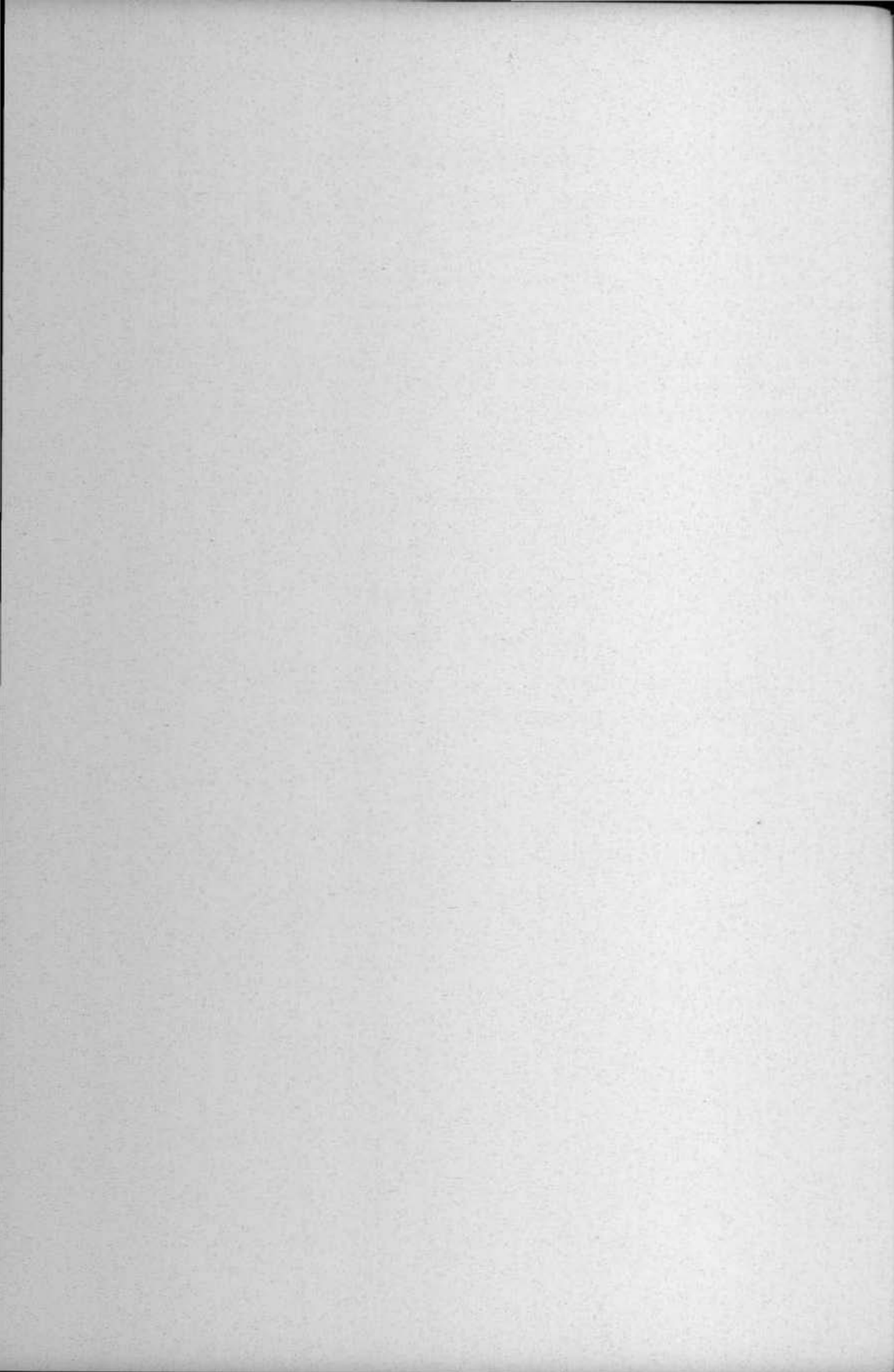
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EXPLANATION

This report contains copies of a majority of the opinions rendered by this office during the past two years. The opinions that are omitted are of a purely local nature or application. It has been necessary to eliminate some material in the interest of economy since the number of opinions issued has increased beyond all expectations. A copy of any opinion omitted from this report is on file in this office. For omitted opinions by number and subject matter, see index and table of omitted opinions listed immediately preceding the alphabetical index.

BIENNIAL REPORT EDITORIAL STAFF

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ROSE D. KITCHEN	<i>General Indexing</i>
JEWELL R. ROEMER	<i>Citator</i>
DOROTHY M. STARK	<i>Copy Editor</i>



BIENNIAL REPORT
of the
ATTORNEY GENERAL
State of Florida

January 1, 1961, through December 31, 1962

061-1—January 1, 1961

TAXATION

**HOMESTEAD EXEMPTIONS—GRANTEES—APPLICATIONS
—CORRECTION OF ERRORS—§7, ART. X, STATE CONST.;**
§§192.04, 192.15, 192.16, 192.161, 192.19 AND 192.21, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. May a grantee of a homestead owner and occupant, purchasing the homestead property subsequent to January 1 of the tax year, and occupying it as his homestead, make application for homestead tax exemption when his grantor refuses or fails to do so?

2. Where an application for homestead tax exemption is found to be false and the claimant not entitled thereto, after the same has been allowed, may the exemption be withdrawn and denied by the taxing officials?

Section 7, Art. X, State Const., provides that "every person who has the legal title or beneficial title in equity to real property in this state, and who resides thereon and in good faith makes the same his or her permanent home ... shall be entitled to an exemption from taxation ..." (Emphasis supplied.) Under its authority to "provide appropriate and reasonable laws regulating the manner of establishing the right to said exemption," the legislature, by §§192.15 and 192.16, F. S., has required that "each taxpayer who claims said exemption shall file one of said forms (application form provided by §192.15), properly filled out and executed, with the assessor on or before April 1" of the tax year, "and the failure to do so shall constitute a waiver of said exemption for such year." In *Simpson v. Hirshberg*, 159 Fla. 25, 30 So. 2d 912, one John Hubert Davalt and wife owned and occupied a homestead in Duval county on Jan. 1, 1945, although negotiations for its sale were commenced on Dec. 26, 1944, and culminated in the making and delivery of a deed sometime after Jan. 1, 1945, and they continued in occupancy thereof until Jan. 11, 1945, when possession was delivered to the purchaser of said property pursuant to deed delivered and effective as of Jan. 8, 1945.

In the language of the court "there is nothing therein (in the homestead tax exemption amendment of the constitution) which

indicated that such could be the case. Certainly the homestead character attached to the property. The mere transfer of the title, on Jan. 8, 1945, and the removal of the Davalts from possession on Jan. 11, 1945, did not itself divest the property of its homestead character, which it had already acquired." The status of real property on the tax day (Jan. 1 of the tax year in Florida) determines its status as exempt or taxable property for the tax period or year (§192.04, F. S.; *Simpson v. Hirshberg*, supra; *Riverside Military Acad. v. Watkins*, 155 Fla. 283, 19 So. 2d 870, text 871; *Gelb v. Aronovitz*, Fla. App., 98 So. 2d 375, text 378; §192.04, F. S. *Dolores Land Corp. v. Hillsborough County, Fla.*, 68 So. 2d 749; *U. S. v. Alabama*, 313 U. S. 274, 61 S. Ct. 1011, 85 L. ed. 1327).

Under the facts presumed by question 1, the property would be entitled to homestead tax exemption unless such exemption be waived by failure to make the required application. The constitutional amendment (§7, Art. X) providing for homestead tax exemption does not specifically require the making of an application for the exemption; such requirement is a statutory one required by §§192.15, 192.16 and 192.161, F. S. Although the form for application, provided by §192.15, contemplates application by the person residing on the property and making the same his permanent home, it is noted that the statutory requirement is that the form used be *substantially* in the form as set out. Section 192.16 provides that "each *taxpayer* who claims said exemption, shall file one of said forms, properly filled out and executed ..." not each *homesteader* who claims said exemption. (Emphasis supplied.) There are other references in said §192.16 to *taxpayer* but none to *homesteader*. Where a homesteader, who resided on a parcel of land on Jan. 1 of the tax year and was entitled to homestead tax exemption, transfers such property subsequent to said Jan. 1 he "could not change the status of the property, which had already been determined." (*Simpson v. Hirshberg*, supra). This statement seems to treat the homestead tax exemption right as a status and not as a personal right of the homesteader.

As a general rule, when a homestead is sold, the purchaser takes title clear and free of judgment liens and claims against the vendor which could not be enforced against the homestead during the time the vendor occupied it as his homestead, and such purchaser may claim the exemption to protect his rights in the property (40 C. J. S. 612, §149; *Hart v. Gulf Fertilizer Co.*, 91 Fla. 991, 108 So. 886). Where the property is exempt on the tax day its subsequent change to a taxable status will not usually deprive it of the exemption for that year (84 C. J. S. 455-456, §237; *Simpson v. Hirshberg*, supra). This leads to the conclusion that, under proper circumstances, the grantee of property (for homestead use by said grantee) entitled to homestead tax exemption for a particular year, may, upon the failure or refusal of the grantor to make application for the exemption, file an application for and in behalf of the said grantor. However, when homestead property is conveyed after the first of the year to a person, firm or corporation not entitled by law to homestead exemption and no application for exemption previously has been filed by the grantor, then it is our view that such purchaser who is ineligible in law for such exemption would not be authorized to file claim for such exemption either directly or on behalf of the grantor and consequently for that year no exemption could be claimed or allowed.

We come next to the question of revocation of a homestead

tax exemption when, because of subsequent evidence or information coming to the attention of the taxing authorities, it is made to appear that the property exempted is not the permanent home of the landowner or of persons dependent upon him. For a landowner to be entitled to homestead tax exemption he must reside thereon and in good faith make the same his permanent home, or the permanent home of another or others dependent upon him, and, if there be no such permanent home there can be no right to homestead tax exemption. Any person filing a false claim for homestead tax exemption is guilty of a misdemeanor (§192.16(3), F. S.) Any grant of exemption based on false information in an application of the exemption would be a fraud upon the revenues of the county unless corrected. No act of omission or commission on the part of any of the taxing officials, including the tax assessor, is permitted to defeat the payment of the taxes due, and "no assessment shall be held invalid unless the property was not subject to taxation, or that the taxes have been paid or redeemed, or the description is void and the property may not be located therefrom." (§192.21, F. S.). This section shows a clear intent that all taxable property pay its fair share of the tax burden. We are of the opinion that the tax assessor, at any time prior to the equalization of the tax roll may correct an erroneous assessment or exemption and may revoke an exemption previously allowed, upon proper proof of his error in granting the same in the first place. Errors "of omission or commission may be corrected at any time by the officer or party responsible for the same in like manner as is now or may hereafter be provided for performing such acts in the first place." (§192.21, F. S.). Any correction made in an assessment after the equalization of the tax roll should be with the consent of the board of county commissioners as tax equalizers. In case of the denial of a homestead tax exemption, after the same has been previously allowed, it should be in full compliance with §192.19, F. S., as to the right of the taxpayer to be heard.

In the light of the above and foregoing, question 1 is answered in the affirmative; however, the failure of the owner on the tax day to make the same should be fully explained and when the application is made by the grantee of the homesteader, clear proof of the homestead status should be required; question 2 is also answered in the affirmative; however, care should be taken that the taxpayer have an opportunity to be heard upon the question of his claim before the tax assessor and the board of county commissioners.

061-2—January 6, 1961

COUNTY JUDGES

FEES—REGISTRATION OF COMMON LAW MARRIAGES—
§§409.183, 741.01, 741.02, 382.23, 382.24, 382.26, F. S.

To: *Bryan Willis, State Auditor, Tallahassee*

QUESTION:

What is the proper fee to be collected by the county judge for his service performed in connection with the registration of common law marriages under §409.183, F. S.?

Section 409.183, enacted by the 1959 legislature, relates to welfare assistance for dependent children and prevents introduction of proof of the existence of a valid common law marriage *unless*

such marriage shall be registered in the office of the county judge of the county wherein the parties reside. Said section further provides:

... Such registration shall be on forms provided by the county judge setting forth under oath substantially the same facts required on the application for a marriage license, *shall be subject to the payment of the same fees and shall be signed by both parties to the marriage.* Upon receipt of the completed registration and fees, the county judge shall cause the marriage to be recorded in a register to be known as register of common-law marriages.... (Emphasis supplied.)

The fees of the county judge in connection with the issuance of a marriage license are contained in §§741.01 and 741.02, F. S. Section 741.01 provides for the payment of a fee of \$2; and §741.02 provides for the payment of an additional fee of \$1 "to be distributed as provided by §382.24."

Section 382.24 provides:

On or before the fifth day of each month each of the several county judges of the state shall transmit to the bureau of vital statistics *seventy-five cents of each one dollar collected by him under the provisions of §741.02,* during the preceding calendar months, retaining the remaining twenty-five cents, of each one dollar so collected, as his compensation.

It should be noted that the legislature has made *transmission* of the seventy-five cents of each dollar collected under §741.02 to the bureau of vital statistics a mandatory requirement.

The validity of common law marriages is well recognized in this state; such marriages are as legal as ceremonial marriages, can be abolished by the legislature, and can only be dissolved by divorce or death of either of the parties. (*U. S. v. Layton*, 68 F. S. 247; *In re Colson's Estate*, 72 So. 2d 57.)

According to the provisions of §§382.23, 382.26, F. S., the legislature has given the bureau of vital statistics certain powers and duties in connection with the recording of marriage licenses. Said sections designate the bureau of vital statistics as the central unit whose duty it is to compile, keep, and preserve the records of all marriages and divorces. In keeping with this plan, it appears to have been the intent of the legislature with the enactment of §409.183, *supra*, subjecting the registration of common law marriages to the *payment of the same fees as required for marriage licenses*, to provide for the compilation and preservation of such common law marriages with the bureau of vital statistics; thereby giving equal dignity to the common law marriage, the validity of which is recognized in the state.

The functions and duties presently performed by the bureau of vital statistics in connection with marriage licenses, for which seventy-five cents of the marriage license fee is transmitted to said bureau under §382.24, *supra*, should also be performed in connection with the central registration of common law marriages.

Giving the above statutes their plain and obvious meaning and thereby effectuating the intent of the legislature, it would appear that the proper fee to be charged by the county judge for the registration of common law marriages under §409.183, *supra*,

is \$2.25 (\$3, less the 75c transmitted to the bureau of vital statistics under §382.24.)

Your question is, therefore, answered accordingly.

061-3—January 9, 1961

TAXATION

FLORIDA INHERITANCE TAXES—NONRESIDENT—PROPERTY IN TWO OR MORE STATES—ASSESSMENT— §198.03, F.S.; §11, ART. IX, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

Where a nonresident decedent, subject to inheritance taxes, leaves property with a tax situs in two or more states, including this state, how should the value of the taxable property in this state, and the amount of the taxes due, be determined?

Inheritance taxes are prohibited by §11, Art. IX, State Const., except in such amounts "which may by any law of the United States be allowed to be credited against or deducted from any similar tax upon inheritances, or taxes on estates assessed or levied by the United States on the same subject," such power of state taxation of inheritances existing only so long as such a tax is levied and assessed by the U. S. and a credit is allowed thereon for state inheritance taxes paid. In other words, Florida may not levy and assess a so-called stepped-up inheritance tax—that is, an inheritance tax in addition to the tax credit allowed for state taxes paid by the federal statutes. Florida inheritance tax statutes must be construed in the light of this constitutional limitation on the power of the legislature, and may not transgress said limitation.

Section 198.03, F. S., imposes the Florida inheritance tax upon property of nonresident decedents leaving property having an inheritance tax situs in this state; usually consisting of real property and certain tangible personal property acquiring a separate tax situs in this state. Such real and tangible personal property is, by said §198.03, made subject to taxation in this state, "the amount of which (tax) shall be a sum equal to such proportion of the amount of the credit allowable under the applicable federal revenue act for estate, inheritance, legacy and succession taxes actually paid to the several states, as the value of the property taxable in this state bears to the value of the entire gross estate wherever situate." This section apportions the tax credit allowed, for state taxes paid, under the federal statute to the states wherein the property of the estate is situate, in proportion to the taxable value of the said property located in the several states. This apportionment of taxable value is based on the federal valuation for inheritance tax purposes and does not take into consideration independent valuations made by any of the states.

Florida's inheritance tax is to be determined from the federal tax credit allowed for state taxes paid and the apportionment of the federal valuation of the taxable property located in the state and having a tax situs in said state. The Florida tax rate is fixed by the credit allowed for state taxes paid by the federal statutes. This is the measure adopted by the statute for determining the recognized tax levied by another state when determining the Florida tax; so-called stepped-up or additional state taxes imposed by

other states are not to be taken into consideration in determining the Florida tax. You pose an example where the inheritance is located partly in Florida and partly in another state—seventy-five per cent in Florida and twenty-five per cent in the other state, with a total available state tax credit of \$2,000, but with a stepped-up or additional tax in the other state equal to or exceeding the Florida portion of the federal tax credit. Under the Florida constitution and statute Florida would be entitled to seventy-five per cent of the said \$2,000 credit, or \$1,500, and the other state twenty-five per cent thereof, or \$500. The fact that the other state assesses a stepped-up or additional tax should not and does not reduce the tax payable to Florida. The stepped-up or additional tax imposed by the other state is not to be taken into consideration when determining the taxes due Florida. This appears to have been the holding of this office in its opinion of April 14, 1933 (1933-4 AGO 61). These observations seem to answer the above stated question, unless there has been a binding administrative or other construction otherwise.

It appears from the request for opinion that for a number of years the said opinion of April 14, 1933, has not been followed, the deviation from said opinion having occurred prior to your administration. "It is settled law that a construction placed on a statute by a state administrative officer . . . is a persuasive force and influential with the courts, when found not to conflict with some provision of the constitution or the plain intent of the statute (Volunteer State Life Ins. Co. v. Larson, 147 Fla. 118, 2 So. 2d 386, text 387; McKinney v. State, Fla., 83 So. 2d 875, text 876) or clearly erroneous (U. S. Gypsum Co. v. Green, Fla., 110 So. 2d 409, text 414; Gay v. Canada Dry Bottling Co., Fla., 59 So. 2d 788). Our construction of the constitutional and statutory provisions above discussed indicates that the opinion of April 14, 1933, was correct and that any deviation therefrom was contrary to the intent and purpose of the above constitutional and statutory provisions and clearly erroneous and should be no longer followed.

061-4—January 10, 1961

TAXATION

REFUNDS UNDER §193.221 (HELD UNCONSTITUTIONAL, 119 SO. 2d 35); §§199.31, 215.26, 193.40, 192.21 AND 95.08; CH. 199, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. Are those persons paying ad valorem taxes assessed on oil and mineral rights, under and pursuant to §193.221, F.S. (held to be unconstitutional) entitled to refunds of the taxes so paid?

2. Are such persons, if question 1 is answered in the affirmative, entitled to interest on the taxes so paid?

3. If refunds are to be made, from what fund or funds should the same be paid?

4. Is there any limitation on the time for the making of application for refunds?

Section 193.221, F. S., providing for the separate assessment and collection of ad valorem taxes on oil and mineral rights in or under land, was held unconstitutional and void by the court in

Cassady v. Consol. Naval Stores Co., Fla., 119 So. 2d 35, so that the assessment made under said §193.221 was invalid and unauthorized by law. In State v. Green, Fla., 101 So. 2d 805, the court held that intangible personal property taxes were subject to refund under §199.31 or §215.26, F. S., when unauthorized and illegally imposed. The taxes imposed under and pursuant to said §193.221, F. S., being unauthorized and illegally imposed, so that a payment of the same was a "payment when no tax was due," within the purview of §193.40, F. S.

Said §193.40, after making provision for the refund of real and tangible personal property taxes paid where no tax was due, on order of the state comptroller, provides that "the board of county commissioners shall comply with the order of the comptroller in such matters by providing in the county budget for the ensuing year for the payment of such refunds, and the board shall have authority to authorize such tax levies as may be necessary to provide the fund from which to make the refunds so ordered." Except for said §193.40, county taxes voluntarily paid could not be refunded without specific legislation making provision therefor (North Miami v. Seaway Corp., 151 Fla. 309, 9 So. 2d 705; Orlando v. Gill, 128 Fla. 139, 174 So. 224; Johnson v. Atkins, 44 Fla. 185, 32 So. 879). Said §193.40 provides that "the comptroller shall pass upon and order refunds where payment has been made *voluntarily* or involuntarily of taxes assessed on the county tax roll" (emphasis supplied) where no taxes were due, or where there has been an overpayment of taxes. Whether the payment be when no tax was due, or an overpayment, whether it was voluntarily or involuntarily made is immaterial under the said statute.

As a general rule the state and its subdivisions, agencies, etc., are not liable for interest on amounts payable by such state and its subdivisions, agencies, etc., in the absence of a statute expressly or by strong implication making provision for such interest (Mailman v. Green, Fla., 111 So. 2d 267, text 269; 8 Fla. Jur. 241, §99). Under said §193.40, "the board of county commissioners shall comply with the order of the comptroller in such matters by providing in the county budget for the ensuing year for the payment of such refunds, and the board shall have authority to authorize such tax levies as may be necessary to provide funds with which to make the refunds so ordered." The statute, therefore, indicates no intention to make refunds from the county or district funds into which the taxes paid may have been transferred or paid. It would seem to be a reasonable construction of said §193.40 to hold that the refunds may be made from existing budgets if funds be available therein, such as reserves for contingencies when clearly available.

Although §215.26, F. S., which provides for refunds of overpayments and payments into the state treasury, where no tax, license or account is due, contains a limitation requiring that applications thereunder be made within a specified time from the making of such payment, we find no similar limitation in said §193.40. General statutes of limitations appear to have been applied to applications for refunds of taxes in Mayor and City Council of Baltimore v. Household Finance Corp., 168 Md. 13, 176 A. 480; Carter v. Collins, 174 Okla. 4, 50 P. 2d 203; and Richards v. Wyandotte County, 28 Kan. 326; and in Ward v. Love County, 253 U. S. 17, 40 S. Ct. 419, 64 L. ed. 751, the U.S. supreme court returned the case to the state court to determine whether a statute

of limitation might apply to an application for a refund of taxes.

Section 95.08, F. S., provides that "every claim against any county shall be presented to the board of county commissioners within one year from the time said claim *shall become due*, and shall be barred if not so presented." (Emphasis supplied.) Although the claim for a refund is allowed, under said §193.40, by the comptroller, it is to be paid by the county in accordance with the order of the comptroller. The claim for refund is in effect a claim against the county, the same being payable from county funds. Although §199.31, F. S., contains no express limitations on the making of applications for refunds, the court, in *State v. Gay*, Fla., 74 So. 2d 560, 46 A. L. R. 2d 1340, applied the limitation contained in §215.26, to an application for a refund of intangible personal property taxes paid under Ch. 199, F. S. Section 215.26 is a limitation upon payments from the state treasury. We therefore hold that §95.08, F. S., should be applied to refunds under §193.40, unless and until held inapplicable by the courts.

Normally over-assessments of taxes, as well as assessments where no tax is due, are in the nature of errors or omissions of the taxing officials, subject to correction "at any time by the officer or party responsible for the same in like manner as is now or may hereafter be provided by law for performing such acts in the first place," (§192.21, F. S.); this being true, it would appear proper that applications for refunds under §193.40 be passed upon by the county taxing officials, prior to being presented to the state comptroller. We are, therefore, of the opinion that applications for refunds under §193.40 should be addressed to the comptroller, but filed with the county tax assessor to be approved or disapproved by him, and after approval or disapproval he should transmit the same to the county board of equalization, who should either approve or disapprove the action of the tax assessor, and forward the same to the state comptroller for his action under said §193.40. If approved by the comptroller he should direct the payment of the refund by the county board in accordance with said section. Where a particular assessment has been held, either an assessment when no tax is due or an over-assessment, *by a court* the same may be refunded by the county without action by the county tax assessor or the county board, as to the particular assessment, but other assessments within the purview of the court order, but not involved therein directly, should be approved by the tax assessor as being identical assessments with the one passed on by the court. Such would be the assessments under §193.221, F. S., not directly involved in *Cassady v. Consol. Naval Stores Co.*, supra., provided, however, the comptroller may make a general order for refunds as to taxes within the purview of such a case but not directly involved therein, which refunds may be made by the county commissioners without specific action in each case by the comptroller, upon certificate by the tax assessor as to the over-assessment or assessment when no tax was due, which certificate itself may be general.

The limitation in §95.08, F. S., above referred to, requires that claims against the county be presented "within one year from the time said claim shall become due," under §215.26, F. S., as involved in *State v. Gay*, Fla., 74 So. 2d 560, the limitation was "one year after the right to such refund shall have accrued," which

was held to be from the date of the payment of an assessment, when no tax was due or there was an overpayment of the tax. The phrases "shall become due" and "shall have accrued" mean substantially the same thing.

Question 1 is answered in the affirmative; question 2 in the negative; question 3 by stating that refunds are to be made from the fund mentioned and provided for in §193.40, or from other available funds, and question 4 in the affirmative, that is, §95.08, F. S.

061-5—January 16, 1961

CRIMES

VIOLATION OF STATE LOTTERY LAW—CHAMBER OF COMMERCE BINGO GAME

To: Warren H. Edwards, County Solicitor, Orlando

STATEMENT OF FACTS:

Orlando chamber of commerce proposes to conduct bingo games for the entertainment of tourists in that area. There would be no admission or other charge levied for participating in the bingo games. The chamber of commerce would furnish small prizes such as bags of oranges, theatre tickets, etc., with the value of such prizes being limited to two or three dollars.

QUESTION:

Would the above proposed contest, if conducted, be a violation of the state lottery law?

There are three elements to a lottery, viz: a prize, an award by chance and a consideration.

It is apparent that this contest carries with it a prize even though nominal in amount. This office has many times held that the game of bingo is a game of chance (AGO 057-363 and 054-213). Therefore, the first two elements of a lottery are present.

I am of the opinion, however, that the third element, e.g., a consideration, is not present in this particular scheme. Although the contest would present an inducement to members of the public to present themselves at the Orlando chamber of commerce for the purpose of taking part in this contest, there would not appear to be anything tangible of value paid by such persons for the privilege of participating in the contest. The players would not be exposed to any goods, wares or merchandise of a sponsoring merchant and there would not seem to be any way that the Orlando chamber of commerce could receive anything of benefit by virtue of the participation in this contest. While it is conceivable that such a contest might result in tourists feeling more friendly toward merchants of the area and thereby be more inclined to spend their money with such merchants, such a speculative theory could not be relied upon to furnish the consideration necessary to denominate this contest a lottery.

As a word of caution, I should like to point out that certain small changes in the format of this contest could bring it within the prohibited area. For example, if the contest were set up so that merchants who are members of the chamber of commerce were to furnish the prizes on a rotating basis, with the merchants

furnishing the prizes during a particular week advertising their establishments at the place where the game is being played, or taking the opportunity of securing names and addresses of the contestants for the purpose of preparing a mailing list, then it *might* be that such changes in the format would require a different opinion from this office.

In view of the above, I am of the opinion that this contest, so long as it is conducted strictly in the manner described above, would not constitute a lottery under the laws of this state.

061-6—January 17, 1961

INDIAN DIVORCES

RECOGNITION OF DIVORCE GRANTED UNDER SEMINOLE TRIBAL LAW

To: Tom Treadwell, Collier County Judge, Naples

QUESTION:

Should a divorce granted under the tribal law of the Seminole nation to an Indian who was married under such tribal law, and of which marriage there was issue, be recognized in the jurisdiction of Florida in determining whether a marriage license for a subsequent marriage should be granted to such Indian?

A thorough research of the Florida digest reveals that there are no Florida cases on point. AGO 060-24, Feb. 2, 1960, discusses the state's criminal jurisdiction over Indians; but such opinion does not answer the present civil-law question. However, such opinion is very informative as to the legal relationship between Indian reservations and this state. Neither the full faith and credit clause of the U.S. constitution nor the doctrine of comity is applicable to the dissolution of Indian marriages by tribal laws (*Begay v. Miller*, 222 P. 2d 626, 628, col. 2). However, the general rule that a divorce valid by the law where it is granted is valid everywhere does govern the validity of an Indian divorce (*Begay v. Miller*, supra).

In the *Begay* case the supreme court of Arizona held that an Indian who is married under the laws of Arizona and obtains a marriage license from that state can be granted a divorce by the tribal courts of the Navaho tribe wherein he is residing and that such divorce must be recognized as valid by the state of Arizona. Even though a valid marriage has resulted through tribal custom, such marriage can be dissolved only according to state law if the state law has been made applicable to the Indian reservation by federal statute subsequent to the marriage ceremony (*Palmer v. Cully*, 153 P. 154). There is no federal statute causing the state of Florida to have civil jurisdiction over an Indian reservation. Chapter 28 USCA, § 1360, makes laws of certain states applicable to Indian reservations found in such states. Florida is not included in such section.

In 35 L.R.A. N.S. 796 (see note on p. 796) it is pointed out that some jurisdictions have dicta to the effect that where parties are lawfully married within the jurisdiction of the state and subsequently reside in Indian territory, the marriage cannot be dissolved in accordance with Indian custom. However, this footnote is in opposition to the case of *Cyr v. Walker*, 35 L.R.A. N.S. 795, which holds that a non-Indian who is adopted by a tribe and mar-

ries a white woman in accordance with state law could obtain a valid divorce by Indian tribal ceremony.

These latter illustrations are for the purpose of showing how far the law has been willing to go in recognizing the validity of Indian divorces. Your question does not involve the extremes of the possible situations because the Indian with which it is concerned married in accordance with tribal law, lived on the reservation, and was divorced in accordance with tribal law.

The fact that there was issue of the marriage in the present question does not change the legal results. In the case of *Reynolds v. Reynolds*, 41 So. 2d 310, the supreme court held that a husband could be required by a circuit court to pay child support even though only the husband was before the court on his own petition for divorce. Such decision could in no way enhance your own authority to render a support decree even if the facts here were such as to place the husband within the jurisdiction of the county judge's court, such decision being applicable only to circuit courts.

It is my opinion, therefore, under the above authorities and specifically *Begay v. Miller*, supra, that your question should be answered in the affirmative and that you have no alternative but to grant the license.

061-7—January 20, 1961

LEGISLATION

CONSTRUCTION OF §§11 and 15 OF CHAPTER 59-1001, LAWS OF FLORIDA, PROHIBITING STATE ATTORNEY FROM PRACTICE OF LAW AS TO CASES UNDERTAKEN PRIOR TO EFFECTIVE DATE OF LAW

To: *Paul B. Johnson, State Attorney, Tampa*

QUESTION:

May a state attorney, who takes office under authority of Ch. 59-1001 (effective Jan. 3, 1961), complete cases after the effective date of such act when such cases were contracted for prior to the effective date?

Section 11 of Ch. 59-1001 contains the following provision:

Section 11. The state attorney shall not engage in the practice of law during his term of office, except in his capacity as prosecutor for the state . . .

Section 15 of Ch. 59-1001 contains this provision:

Section 15. This act shall take effect on the first Tuesday after the first Monday in January, 1961.

You state in your letter that you terminated your civil law practice on Jan. 2, 1961, but that there are four matters for which you had previously accepted compensation but as to which litigation has not been terminated. You further state that you were retained in these four cases in May, October, and November of 1959 and April of 1960. You also say that these four cases have thus far been personally handled by you, and you remark that it would place your clients in an extremely disadvantageous position if you should be compelled to withdraw from any of these cases before their completion.

We have not been able to find any case construing a statutory provision similar to §11 of Ch. 59-1001 and relating exclusively to prosecuting attorneys. However, we have found many cases construing such sections in relation to judges; and in the case of *Aldridge v. Capps*, 156 P. 624 (Okla., 1916), the court construed

a similar provision relating to county attorneys to whom were entrusted the criminal affairs of the county. There the Oklahoma court construed §1557, Revised Laws 1910, which provided: "The county attorney shall not engage in the private practice of law ..." We quote from an applicable portion of the decision:

The statute prohibiting judges from practicing law in this state is no more mandatory than the statute prohibiting county attorneys from practicing law in civil cases, and if a case should be reversed, as was done in the case of Lilly v. State, supra, because a district judge participated as an attorney in the trial, we are unable to see why a like rule should not be in force where, as in the instant case, the county attorney engaged in the trial in a court of record in the county of which he was such county attorney. In each instance there was a clear violation of a mandatory statute of this state, without excuse, and in this case against the express objection of the defendant. The right of the county attorney to practice law in private civil cases is hedged about by the prohibitive provision of said section 1557, supra, and therefore the county attorney is in the same position as to the practice of law in private civil matters as though he had never been admitted to practice law.

We have found no specific authority for a prosecuting attorney, who is forbidden by statute to practice law except in his official capacity, to take a reasonable amount of time to wind up civil affairs in which he had been retained and had accepted compensation prior to assuming office; all of the cases which we have encountered in our research concerning either judges or prosecuting attorneys indicate, as did the Aldridge case, supra, that an attorney is, in effect, immediately disbarred by operation of statutes similar to §11 of Ch. 59-1001, supra, upon taking the office of judge or prosecuting attorney just as though his license had been withdrawn as of that date. However, as will be pointed out hereinafter, the present question is distinguishable from such cases.

We call your attention to §15 of Ch. 59-1001, supra, from which we discover that the act was not to take effect until January of 1961. Section 17 of the declaration of rights of our Florida Constitution reads as follows:

SECTION 17. Attainder; ex post facto laws; Obligation of contract. No bill of attainder, ex post facto law, nor any law impairing the obligation of contracts, shall ever be passed. (Emphasis supplied.)

Section 10, Art. I, Clause 1 U. S. Const., reads: "No state shall ... pass any ... law impairing the obligation of contracts" In 12 Am. Jur., Contracts, §164, it is stated:

Effect of state on existing agreement.— ... (A) statute should, if possible, be construed prospectively in order to avoid impairing the obligation of existing contracts;

We also quote from *Koshkonong v. Burton*, 104 U. S. 668, 678: "... In this country, ... declaratory laws, so far as they operate upon vested rights, can have no legal effect in depriving an individual of his rights"

It is apparent, therefore, that Ch. 59-1001, cannot operate retroactively so as to impair obligations under contracts entered into prior to the effective date of that act. The possible contention that the act takes effect from the time of its passage is shown to

be without merit in the case of *Neisel v. Moran*, 85 So. 346 (Fla., 1920). In that case it was said:

A statute passed to take effect at a future day is to be understood as speaking from the time it goes into operation, and not from the time of its passage.

The statute involved herein became effective after your contracts were entered into; and therefore, the statute cannot relate back so as to impair the attorney-client obligations (contracts) which have already been entered into.

The contention that statutes dealing with public morals are an exception to the general rule above stated and that such statutes can operate retroactively even though they impair obligations under pre-existing contracts can also be disposed of. The Florida supreme court has established the rule that "... (P)arties to contracts executed when there are no usury statutes have accrued rights that cannot be impaired or taken away by the subsequent enactment of usury statutes." *Yaffee v. International Co.*, 80 So. 2d 912 (Fla., 1955). What could be more intimately connected with public morals than a usury statute?

It might be said that the private attorney has a choice and that if he accepts the position of state attorney, as created by Ch. 59-1001, he does so on the condition that he should immediately give up all civil cases in which he is at that time engaged and that if he wishes to complete civil cases which he is handling, he should not accept the job of state attorney. Such a point of view is clearly unreasonable. Acceptance of such a proposition would lead to the inevitable result that only an unqualified man with few or no clients would have desired the job of state attorney, in January of 1961.

We assume that it would be extremely difficult and impracticable for you to be required to abruptly terminate, as of Jan. 3, 1961, the four cases above mentioned and that referral of such cases to other attorneys would in all probability entail duplication of work already done and would prove to be disadvantageous and unsatisfactory from the points of view of the clients involved. It stands to reason that your having to return retainer fees previously received from these clients could prove to be a hardship. The law is not so strict and inflexible as to blind itself to the existence of difficulty or hardship; to us it seems equitable and just that you be allowed a reasonable transition period in which to wind up the four cases involved.

Certainly, from the time Ch. 59-1001 went into effect (January, 1961) you, as state attorney, could accept no new civil cases. But as to the four cases which have already been accepted on retainer contracts prior to the effective date of Ch. 59-1001, it is our feeling that they may be completed by you. It must, of course, be understood that you can now do only that for which there existed a contractual duty prior to Jan. 3, 1961. We would advise that you confine your legal representation to the winding up of these cases and that you restrict your activity to doing no more than is absolutely necessary to conclude the four cases mentioned. Only within this narrow circumscribed limit can you be held to be authorized to conclude these specific cases.

Accordingly your question is answered in the affirmative.

061-8—January 23, 1961

TAXATION

APPLICABILITY OF §201.08, F. S., TO VENDOR'S LIENS;
COVENANTS TO PAY—CH. 201, §§201.01, 201.02 AND
201.08, 95.11 (5) F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Where a deed of conveyance recites the retention of a vendor's lien and contains a provision that the vendee agrees to the reservation of the said lien and to pay the unpaid balance of the purchase price, is there a written promise to pay money within the purview of §201.08, F.S.?

The deed of conveyance in question reserved a vendor's lien to secure the payment of the unpaid portion of the purchase price, stipulated to be a stated amount, and contained the provision that the "grantee by the acceptance hereof agrees to the reservation of said vendor's lien and to pay the said unpaid balance of the purchase price . . ." In this state where a grantee accepts title by deed poll, "knowing that it contains a covenant that the grantee assumes a specific indebtedness against the lands as a part of the purchase price, renders himself liable to pay the debt as effectually as if he had agreed to pay the same by indenture executed under his own hand and seal." (*Shirley v. Dowling*, 155 Fla. 433, 20 So. 2d 500; see also *Swanson v. Bennett*, 157 Fla. 113, 25 So. 2d 207, text 209; *Alabama-Florida Co. v. Mays*, 111 Fla. 142, 149 So. 61, text 63 and 64; *Luria v. Bank of Coral Gables*, 106 Fla. 175, 142 So. 901, text 904; *Summer v. Osborne*, 101 Fla. 742, 135 So. 513, text 516; *George E. Sebring Co. v. Hooker Hammock Farms*, 101 Fla. 388, 134 So. 199, text 200; *Whitfield v. Webb*, 100 Fla. 1619, 131 So. 786, text 787; *Slottow v. Hull Investment Co.*, 100 Fla. 244, 129 So. 577, text 579; *Brownson v. Hannah*, 93 Fla. 223, 111 So. 731, text 733). Such covenants bind the grantee "as effectually as if it were a contract executed under his own hand and seal" (*Alabama-Florida Co. v. Mays*, supra). The grantee "is as effectually bound by said deed as though it was an indenture deed interpartes" (*Swanson v. Bennett*, supra). The 20-year statute of limitations is applicable to such covenants although the deed be not signed by the vendee (§95.11(1), F.S.), the same being an obligation under seal, when the deed itself is under seal.

The document in question, being a warranty deed, is within the purview of §201.02 as such and subject to taxation thereunder as an instrument in writing whereby lands, tenements, or realty, or any interest therein is granted, assigned, transferred or otherwise conveyed to or vested in the purchaser. As above demonstrated, the document, because of the covenant therein obligating the vendee to pay the remainder of the purchase price, is likewise an obligation to pay money. The grantee "is as effectually bound by said deed as though it was an indenture deed interpartes," (*Swanson v. Bennett*, supra) or as if it were a contract "under his own hand and seal" (*Alabama-Florida Co. v. Mays*, supra). As to the vendee, it is a written obligation to pay money, although not actually signed by him.

The tax imposed by Ch. 201, F. S., is upon documents "written or printed by any person, who makes, signs, executes, issues, sells, removes, consigns, or ships the same or for whose benefit or use the same are made, signed, executed, issued, sold, removed, consigned, assigned or shipped in the state." (§201.01, F. S.). Section 201.08, F. S., imposes the tax on "promissory notes, nonnegotiable notes, written obligations to pay money . . . made, executed, delivered, sold, transferred or assigned in the state." The above stated covenant for payment of the unpaid balance of the purchase price for the property clearly constitutes an obligation on the part of the vendee to pay money. Sections 201.01 and 201.08, F. S., like the federal counterpart from which derived, impose the tax not only upon the person "who makes, signs, executes, issues . . ." such document but also upon the person "for whose benefit or use the same are made, signed, executed, issued . . ."

The federal courts have held that the phrase "who makes, signs, executes, issues, sells, removes, consigns, assigns or ships the same," refers primarily to the maker of the instrument while the phrase "for whose benefit or use the same are made, signed, executed, issued, sold, removed, consigned, assigned or shipped," has reference primarily to the grantee or vendee of the instrument (Endler v. U. S. DC NY, 110 Fed. Supp. 946, text 948; Crawford v. New South Farm and Home Co., DC Fla., 231 Fed. 999, text 1000; Home Title Ins. Co. v. Keith, DC NY., 230 Fed. 905, text 907; Farmers Loan & Trust Co. v. Council Bluffs Gas and Electric Light Co., Iowa, 90 Fed. 806; Gramby Mercantile Co. v. Webster, CC SC., 98 Fed. 604, text 606; 47 C. J. S. 784, §545, notes 7 and 8). The following state authorities seem to support the same rule (Adams v. Dale, 29 Ind. 273; Myers v. Smith, 48 Barb. (NY) 614; Pritenbarker v. Hatler, 24 Pa. Co., 585; Voight v. McKaim, 2 Pittsb. Pa., (522; Peoples Nat'l Bank v. Barker, 30 Pa. Dist & Co., 679).

The above mentioned statutes and authorities seem to answer the above stated question in the affirmative.

061-9—January 24, 1961

ALCOHOLIC BEVERAGES

ALLOCATION OF LIQUOR LICENSES UNDER CHAPTER
31098, 1955, LAWS OF FLORIDA, APPLICABLE TO
ORLANDO AND THE UNINCORPORATED AREAS OF
ORANGE COUNTY—§§561.21(1), 561.20, 561.26(2),
561.36 and 562.14

To: *Thomas E. Lee, Jr., Director State Beverage Department,
Tallahassee*

QUESTIONS:

1. In determining the number of liquor licences available as a result of the 1960 federal decennial census, would it be correct to combine the population of the city of Orlando and the unincorporated area of Orange county and base the number of licenses to which the combined city and county area is entitled on a quota of one license for each 4,000 persons in the combined city and county area; or

2. Should the city of Orlando and the unincorporated area of Orange county have separate quotas based on a ratio of one license to each 4,000 persons?

3. If the answer to question 1 is in the affirmative, would there be any prohibition to the transfer of a quota liquor license located within the corporate limits of the city of Orlando into the unincorporated area of Orange county or to the transfer of a license located in the unincorporated area of Orange county into the corporate limits of the city of Orlando?

Apparently, your inquiry stems from the following language which appears in §1 of Ch. 31098:

In the city of Orlando, Florida *and* all the territory lying outside incorporated cities and towns in Orange county, Florida, the number of licenses which may be granted for the sale of intoxicating beverages by vendors operating places of business where beverages containing alcohol of more than fourteen percentum by weight are sold, is hereby limited to one license for each four thousand persons according to the last preceding federal census and no licenses shall be issued to any applicant therefor for the sale of intoxicating beverages containing alcohol of more than fourteen percentum by weight in excess of one license for each four thousand persons according to the last federal census; . . . (Emphasis supplied.)

The title to said chapter provides:

An act relating to the city of Orlando, Florida, *and* to territory lying outside incorporated cities and towns within the limits of Orange county, Florida; limiting in said city and territory the number of licenses which may be granted for the sale of intoxicating beverages therein . . . (Emphasis supplied.) Section 561.20 (1), F. S., provides:

(1) No license under §561.34 (3)-(8) inclusive, shall be issued so that the number of such licenses within the limits of any incorporated municipality *or* in the territory of any county lying outside of such municipalities therein shall exceed one such license to each 2500 residents, . . . (Emphasis supplied.)

It might, as a technical matter, be said that the legislature, by using the word "*and*" as above indicated, had in mind the combining of the population of the unincorporated area of Orange county together with the population of the city of Orlando and using the total population of those areas for the purpose of determining, based upon one license per 4,000 inhabitants, the number of liquor licenses authorized by Ch. 31098. However, I have serious doubt that in view of the historical background in connection with the allocation of liquor licenses in this state the courts would hold such a fine technical distinction to be controlling.

The words "*or*" and "*and*" in statutes may be used interchangeably where it is necessary to effectuate the legislature's intent (People v. Trustees of Northwest College, 152 N.E. 555, 557, 322 Ill. 120). See Words and Phrases, Vol. III, P. 583, et seq., for citations to numerous cases supporting this proposition.

In determining legislative intent, general policy of the law on the subject, objects which the legislature had in mind in the enactment of the legislation, the purpose sought to be accom-

plished by such legislation, and the nature of the subject being legislated upon is to be considered (*Abood v. City of Jacksonville*, 80 So. 2d 443).

The intent of a valid statute is the law and it is to be ascertained by the consideration of the language and the purpose of the enactment (*Watson v. Holland*, 20 So. 2d 388, 155 Fla. 342).

The legislative intent is the polar star which guides in construing a statute, and such intent must be given effect even though it may appear to contradict the *strict letter* of the statute. *Ervin v. Peninsular Tel. Co.*, 53 So. 2d 647.

Statutes must be construed to effect the evident legislative intent even if the result seems contradictory to rules of construction and the strict letter of the statute, and particularly when a construction based upon the strict letter of the statute would lead to an unintended result that defeats the evident legislative purpose. *Payne v. Payne*, 89 So. 538, 82 Fla. 219. See also *Beebe v. Richardson*, 23 So. 2d 718, 156 Fla. 599; *Smith v. Ryan*, 39 So. 2d 281.

It does not appear to me that the copulative conjunction "and" should be considered as having the same effect as an arithmetical "plus" symbol in determining the number of liquor licenses authorized to be issued in the unincorporated areas of Orange county and the number of liquor licenses to be issued in the city of Orlando. When general legislation on this subject is considered, it appears that §1 of Ch. 31098 is more reasonably construed as changing the numerical standard of 2500 inhabitants per liquor license in the county and 2500 inhabitants in municipalities as appears in §561.20, F. S., to a numerical standard of 4,000 inhabitants in the unincorporated areas of the county and 4,000 inhabitants in the city of Orlando. The consideration of the unincorporated areas of the county, separate and apart from municipalities within the county, also appears in §§561.36 and 561.26 (2) which provides the allocation of the local political subdivisions' portion of the state liquor license fee. See also §562.14, regulating time for sale of alcoholic beverages, municipal and county.

In view of the established policy in keeping with the general statutes of allocating liquor licenses on the basis of population in the unincorporated areas of the county separate and apart from the population basis of municipalities located therein, and in view of the above cited cases dealing with statutory construction, it is my opinion that:

Question 1 should be answered in the negative; question 2 should be answered in the affirmative; and it therefore follows that question 3 would be answered in the negative.

061-10—January 25, 1961

REGULATION OF VOCATIONS AND PROFESSIONS

OSTEOPATHS—PRACTICE IN HOSPITALS IN THE STATE—
§§459.13 and 395.07, F. S.; CH. 19421, LAWS OF FLORIDA,
1939

To: *Eric E. Wagner, Prosecuting Attorney, Pasco County, Dade City*

QUESTIONS:

1. Is there any state law prohibiting doctors of osteopathy from practicing in hospitals located in Florida?

2. Is there any law prohibiting discrimination against doctors of osteopathy in the treatment by them of their patients in hospitals in Florida?

AS TO QUESTION 1:

There is no law in this state which prohibits osteopaths from practicing in hospitals.

AS TO QUESTION 2:

Section 459.13, F. S., provides:

Osteopathic physicians and surgeons licensed under this chapter shall have the same rights as physicians and surgeons of other schools of medicine with respect to the treatment of cases or holding of offices in public institutions.

Although this statute may initially give the impression that osteopaths should be permitted to practice in public institutions, the supreme court of the state has ruled that such statute in itself does not prohibit public institutions from discriminating against osteopaths (*Richardson v. City of Miami*, 198 So. 51).

In AGO 042-288, June 10, 1942, subsequent to the *Richardson* case, *supra*, this office held that osteopaths would have the same right as physicians to practice in public hospitals operated under Ch. 19421, 1939, because such Ch. 19421 in itself specifically provides that there would be no discrimination among the various schools of medicine in the management of such hospitals. It would appear that if the enabling act for the hospital with which you are concerned has no specific provision prohibiting discrimination among the various schools of medicine, the *Richardson* case would be controlling; and osteopaths may be prohibited from practicing in said hospitals.

In the case of *West Coast Hospital Ass'n v. Hoare*, 64 So. 2d 293, 295, the supreme court of Florida indicates that private hospitals are subject to less exacting rules against discrimination than are public hospitals. It would follow that a private hospital could discriminate against two different schools of medicine (*Ann*, 24 A.L.R. 2d 858) under any circumstance justifying a public hospital's discriminating. This is further borne out by the rationale that a private hospital is explicitly permitted to discriminate among various schools of medicine (§395.07, F. S.). Therefore, under the test already outlined in this opinion private hospitals would be allowed to discriminate against different schools of medicine even under the rules applicable to public hospitals.

Question 2 is accordingly answered in the negative except in those cases where a public hospital has provisions in its enabling statute prohibiting discrimination.

061-11—January 25, 1961

TAXATION

FLORIDA INHERITANCE TAXES—RESIDENTS—PROPERTY
IN TWO OR MORE STATES—§§10, 11, ART. IX, STATE
CONST.; §198.02 AND CH. 199, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where a resident decedent, subject to inheritance taxes, leaves property with a tax situs in this state and in one or more other states, how should the taxable

value of the taxable property in this state, and the amount of the taxes due this state, be determined?

Chapter 199, Florida Statutes, provides for the levy and collection of inheritance taxes by this state, under the authority of and limitations imposed by §11, Art. IX, State Const. This section permits inheritance taxes by the state only in such an amount as may be "credited against or deducted from any similar tax on estates assessed or levied by the U. S. on the same subject." Said §11, Art. IX is a limitation upon the amount of inheritance taxes which may be imposed by Florida on her residents and property of nonresident decedents having a tax situs within her borders. Chapter 199, F. S., and each and every section thereof must be construed in the light of this limitation.

Section 198.02, F. S., imposes a tax "upon the transfer of the estate of every person who, at the time of death, was a resident of this state, *the amount of which shall be a sum equal to the amount by which the credit allowable federal revenue act for estate, inheritance, legacy and succession taxes actually paid to the several states shall exceed the aggregate amount of all constitutionally valid estate, inheritance, legacy and succession taxes actually paid to the several states of the United States (other than this state) in respect to any property owned by such decedent or subject to such taxes as a part of or in connection with his estate.*" This provision seems to be subject to more than one construction, one construction being placed on the section is that it provides credit against the Florida tax, when the estate of a resident is involved, of all inheritance and estate taxes paid other states, whether within or without the federal credit allowed by the federal laws; another is that only the taxes paid other states for which federal credit is allowed may be credited against the Florida taxes, the additional taxes levied by other states not being subject to the credit. This office's opinion of April 14, 1933 (1933-4 AGO 61) appears to have followed the latter construction. (Emphasis added.)

The authority under §11, Art. IX, State Const., for the levy and collection of an inheritance or estate tax is limited to "not exceeding in the aggregate the amount which may by any law of the United States be allowed to be credited against or deducted from any similar tax ... assessed or levied by the United States on the same subject." No mention is made in this section, or otherwise in the Florida constitution, of credit for inheritance or estate taxes paid other states or territories of the United States, over and above that for which credit is allowed under federal statutes and laws. Such a procedure would in effect be the payment of taxes levied by other states with funds due to or of the state. Such a construction of said §198.02, F. S., might well be violative of §10, Art. IX, State Const., as the pledge or loan of state credit to individuals, companies, corporations or associations. Any Florida credit for additional inheritance taxes paid in another state would have the effect of increasing the amount of the decedent's estate to the benefit of the heirs, creditors, devisees etc., in the nature of a pledge or loan of state credit to them.

The amount of credit to be allowed under §198.02, F. S., when construed in the light of §11, Art. IX, State Const., for payment of estate taxes in other states is the sum allowable under the federal revenue laws for inheritance taxes paid other states for estate property subject to taxation in such states, being so limited to the taxes for which credit is allowed under federal law, additional

taxes paid other states is not within the credit provisions. This seems to answer the above stated question.

In this connection see also our opinion of January 9, 1961 (AGO 061-3).

061-12—January 25, 1961

TAXATION

DOCUMENTARY STAMP TAXES—PAWN BROKERS—PAWN TICKETS—§§201.08, 205.21, 205.511 AND 715.04, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Are the transactions between pawnbrokers and their customers concerning pawns made between them written obligations to pay money within the purview of §201.08, F.S.?

The only regulation of pawnbrokers found in the Florida Statutes are §§205.51 and 205.511, F. S., which require that they keep a complete and true record of all transactions "showing from whom each article of their stock was purchased, and the date of the purchase, and the date and to whom each article was sold, which record shall at all times be subject to the inspection of all police or peace officers," and make monthly reports to the sheriff of the county wherein the pawnbrokerage business is transacted. Sales of pawns are regulated by §715.04, F. S. Such pawns may be further regulated by Ch. 24, 30 George III, laws of England, acts of about 1757.

A pawn has been defined as "a bailment of personal property as security for some debt or engagement, redeemable upon certain terms and with the implied power of sale on default." (40 Am. Jur. 689-690, §2; *Pepper v. Beville*, 100 Fla. 97, 129 So. 334, text 337). The legal title and general ownership of the pledged property remain in the pledger, while only a special property passes to the pledgee (*Pepper v. Beville*, supra). Generally, the pawn ticket is a receipt for the pledge by the pawnbroker, upon which is entered the description of the property and the amount and terms of the indebtedness secured thereby, together with the name of the person borrowing on the pledged article. An examination of the pawn ticket forms appearing in 10 Am. Jur. Legal Forms, 617 and 618, reveals that, although the amount of the loan may be stated, nothing thereon makes provision for the signature of the pledgee.

It seems evident that unless the pawn ticket or a copy thereof contains a written promise to pay money, or is otherwise specifically within some section of chapter 201, F. S., there is no *written promise* to pay money, although there may be an oral or implied promise to pay, within the purview of §201.08, F. S. Unless the pawn ticket contains a written promise to pay money, an oral or implied promise not being within the statute, it is not within said section and subject to taxation. Whether a pawn ticket is a written promise to pay money must be determined from the face of that document. The pawn is given to secure an obligation or indebtedness, when oral, implied or written.

The above observations answer the above stated question, as well as a general answer may be given thereto.

061-13—January 27, 1961

PUBLIC WORKS

PERFORMANCE BONDS, ROAD CONTRACTORS—CONSTRUCTION OF §255.05, F. S.; UNPAID CLAIMS OF SUB-CONTRACTORS

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. Should the comptroller withhold payment of earned consideration due a road contractor, upon the filing with the state treasurer, by a person supplying labor, materials or supplies to the contractor, of a claim therefor as provided in and by §255.05, F.S.?

2. What is the duty of the comptroller in this same connection where the contract between the contractor and the state road department, through its inclusion of so-called standard specifications or otherwise, where the contractor is, prior to receiving final payment, required to file with or furnish the said department with a sworn "affidavit to the effect that all bills are paid and no suits are pending in connection with the work done under" the contract?

We gather from the file handed us, with your request for opinion, that around May 29, 1956, the Industrial Construction Co. entered into a contract with the state road department under which the said construction company agreed to perform certain construction services for the road department for an agreed compensation. We further gather from said record that the work and services required under the said construction agreement have been completed, and that there remains the sum of \$46,997.96 due and unpaid to the contractor. However, it appears that one C. P. Burgess, a subcontractor under the said Industrial Construction Co., has filed with the state treasurer an affidavit (around Sept. 3, 1959) reciting that the said Industrial Construction Co. "has failed and refused to pay to him the balance of \$7,699.63 which is justly due him," evidently under a subcontract with the said construction company.

On or about July 15, 1960, the Industrial Construction Co., by and through one A. A. Sehlin, filed with the state road department an affidavit stating that "there are no bills remaining unpaid for labor, materials or otherwise, in connection with said contract and work, and that there are no suits pending against said firm or anyone in connection with the work done or materials furnished or otherwise under said contract." There appears in the file no evidence of the payment or other settlement of the Burgess claim, so that, so far as the record reveals, the said claim remains unpaid.

The performance bond appears to have been made and filed under and pursuant to §255.05, F. S., and as required thereby. Such bonds, in addition to the usual requirements, are *required*, by the said §255.05, to contain "the additional obligations that such contractor shall promptly make payments to all persons supplying him labor, material and supplies, used directly or indirectly by the said contractor, or subcontractors, in the prosecution of the work provided for in said contract; and any person, making application therefor, and furnishing affidavit to the treasurer of the state, or

any city, county, political subdivision, or other public authority, having charge of said work, that labor, material or supplies for the prosecution of such work has been supplied by him, and payment for which has not been made, *shall be furnished with certified copy of said contract and bond*, upon which, said person, supplying such labor, material or supplies shall have a right of action, and may bring suit in the name of the state, or the city, county, or political subdivision, prosecuting said work, for his use and benefit, against said contractor, and sureties, and to prosecute the same to final judgment and execution; provided, that such action, and its prosecution, shall not involve the state, any county, city or other political subdivision, in any expense.

"Any person supplying labor, material or supplies used directly or indirectly in the prosecution of the work to any subcontractor and who has not received payment therefor, shall, within 90 days after performance of the labor, or after complete delivery of materials and supplies, deliver to the contractor written notice of the performance of such labor or delivery of such materials and supplies and the nonpayment therefor, and no action or suit for such labor or for such materials and supplies may be instituted or prosecuted against the contractor unless such notice has been given. No action or suit shall be instituted or prosecuted against the contractor or against the surety on the bond required in this section after one year from the performance of the labor or completion of delivery of the materials and supplies." We find no provision in said §255.05 providing for the withholding of compensation due the contractor, upon the filing of the above mentioned affidavit with the state treasurer. The remedy of persons supplying labor, materials or services to the contractor, upon default of the contractor to pay therefor, appears to be to file the claim (affidavit) with the state treasurer who is, thereupon, required to furnish the claimant with a certified copy of the contractor's bond, who may "bring suit in the name of the state ... for his use and benefit, against said contractor and sureties, and to prosecute the same to final judgment and execution" There are certain limitations of time in this connection set out in the said section; however, these limitations will not be here discussed or construed as they do not appear to be before us. We find nothing in said section giving a laborer, materialman or subcontractor any lien or charge upon the compensation due the contractor by the state, etc.

It has been stated that the "broad general purpose of the statute (Ch. 255, F. S.) is to afford a means of protection to those supplying labor and materials in public work in lieu of the lien afforded by other statutes on private works." (Fulghum v. State, 92 Fla. 662, 109 So. 644, text 647 and 648; see also Fulghum v. State, 94 Fla. 274, 114 So. 367, text 370). In Phoenix Indemnity Co. v. Board of Public Instr., Fla. App., 114 So. 2d 478, text 480, the district court of appeal, 1st Dist., referring to the first above Fulghum v. State case, stated that the purpose of the statute was "the broad legislative intent to afford to those supplying labor and materials on public works projects a means of protection in lieu of the lien afforded to them on private works as provided by other statutes." (See also Collins v. Nat'l Fire Ins. Co., Fla. App., 105 So. 2d 190, text 193, and Woodalls, Inc. v. Varn, Fla. App., 106 So. 2d 634, text 636.)

The above authorities show that our statutes providing for

mechanics' and materialmen's liens (Chs. 84-86, F. S.) have no application to public works within the purview of said §255.05, F. S. The remedy of laborers, materialmen and subcontractors, in connection with public works within the purview of said §255.05, for labor, material and work done for or under the contractor, is through proceedings on the contractor's bond as provided in said section. So far as we are advised there is not here involved any dispute relative to the rate of wages for laborers, mechanics and apprentices employed on the public work by the said Industrial Construction Company so as to raise any dispute under §215.19, justifying a withholding of the contractor's compensation under §215.19 (3) (b), F. S.

An examination of the contract by and between the state road department of Florida and the Industrial Constr. Co., dated May 29, 1956, (Road No. A-1-A, State Project, Job. No. 8605-111 Contract No. 4068, Bridge) reveals that such contract was "to accompany the standard specifications approved and adopted April 1, 1954," a copy of which specifications has been exhibited to us. The form of contract appearing near the end of the bidding blank and referred to therein requires the work to be done "as shown by the attached special provisions and proposal, and the accompanying plans and standard specifications." The contract bond provides in part that "the condition of this obligation is such, that if the above bounden principal shall in all respects comply with the terms and conditions of said contract, and his obligations thereunder, *including the standard specifications . . .*" These provisions seem to make the said standard specifications part and parcel of the contract, as well as the performance bond, which is §9.8, P. 48 thereof (the same being the specifications adopted and approved April 1, 1954) and contains the following: "Whenever the improvement provided for under this contract shall have been completely performed on the part of the contractor, and the final inspection and final acceptance have been duly made by the engineer as provided in Art. 5.10 and 5.12, and subject to the terms of Art. 8.9, a final estimate showing the value of the work will be prepared by the engineer as soon as the necessary measurements and computations can be made. All prior estimates and payments shall be subject to correction in the final estimate and payment. The amount of this estimate, less any sums that may have been deducted or retained under the provisions of the contract, will be paid to the contractor within 30 days after the final estimate has been approved by the engineer, provided that the contractor has properly maintained the project as hereinbefore specified, and provided he has furnished to the department *a sworn affidavit to the effect that all bills are paid and no suits are pending in connection with the work done* under this contract, and further provided that the surety on the contract bond shall consent to such final payment and shall agree that the making of payment on such final estimate shall not relieve the surety of any of its obligations under said bond." (Emphasis supplied).

Although there is no such requirement in the statutes, the performance contract bond, by reference to the standard specifications, requires that the department be furnished, by the contractor, a "sworn affidavit to the effect that all bills are paid and no suits are pending in connection with the work done" under the contract as a condition to payment. The contractor, by and through one A. A. Sehlin, by affidavit of July 15, 1960, attested that "there are

no bills remaining unpaid for labor, materials or otherwise, in connection with said contract and work, and that there are no suits pending . . . against the said contractor." By statement appended to the said affidavit the bonding company agrees "that the state road department of Florida may make full payment on the final estimate, including the retained percentage, to said contractor," and that such a payment "shall in no wise relieve the surety company of its obligations under the bond, as set forth in the specifications and contract . . ." Sometime around the first of September, 1959, it appears that one C. P. Burgess filed his affidavit with the state treasurer purporting to show that the Industrial Construction Co. then owed him an unpaid balance of \$7,699.63, which it had failed and refused to pay. The filing of this affidavit or claim was prior to the filing of the above affidavit for and in behalf of the contractor; the Burgess affidavit having been filed Sept. 1, 1959, and the construction company affidavit on July 15, 1960, some nine months later. From aught appearing from the file the Burgess claim could have been settled and paid prior to the making of the affidavit of July 15, 1960.

In conclusion, we find nothing in §255.05, F. S., requiring the state comptroller to withhold payment upon the filing of an affidavit, claim or demand against the contractor, with the state treasurer; the requirement is that the state treasurer furnish the claimant with a copy of the performance bond. The remedy of the claimant, under §255.05, is a suit on the bond; the claimant is given no right to require or have a withholding of compensation from the contractor by the state comptroller. The provisions in the standard specifications requiring that the contractor, as a condition to settlement and final payment, furnish the state road department with an affidavit showing the payment of all bills and that no suit is pending does not seem to involve the state comptroller; said affidavit appears to be more in the nature of an absolute statement by the contractor that things required by the contract to be done, have in fact been done. Inasmuch as no privity of contract exists between this state and subcontractors, materialmen, laborers, etc., on state construction projects, and those persons having no right to the protection of the provisions of the mechanics lien laws against the state, it does not appear that contracting state agencies would be required to determine the correctness of the statements in a contractor's affidavit.

Further, inasmuch as state officials have no authority to withhold final payments from the general contractor on state projects because of claims against the general contractor presented to said officials by subcontractors, materialmen, and laborers, it would appear that any dispute between such persons and a general contractor on a state project does not in any way involve the state. Hence, it does appear that such disputes must be resolved, if litigation be necessary, either in accordance with §255.05, F. S., viz., an action against the general contractor's bond, or under proper circumstances an action by the subcontractors, materialmen, or laborers against the general contractor for breach of contract.

There is no obligation imposed by such an agreement on the state comptroller, who is not a party thereto, to withhold payment from the contractor or otherwise, or to require copies of the affidavits furnished the department, when the bondsman has agreed to such payment in writing. The obligation of the department under its contract with the contractor containing such a requirement for

affidavit is a matter for its concern, not that of the comptroller, and one which may be taken up with its legal advisors in each particular case or contract.

It being the duty of the state comptroller to pay vouchers certified by the department for payment, when in conformity with the constitution and statutes of the state, not being bound by the contract by and between the department and the contractor to which he is not a party, he is entitled to rely on the requirements of §255.05, F. S., and the remedies thereunder provided to laborers, materialmen, and subcontractors, when processing vouchers approved by the department for payment. Therefore, question 1 is answered in the negative; and question 2 by stating that the comptroller, not being a party to the contract provision for affidavit, may pay the claim upon proper requisition for payment and may rely upon the provisions of §255.05, F. S., for the protection of laborers, materialmen and subcontractors, when the same is consented to by the bondsmen in writing, as in this case, under the terms of his performance bond.

061-14—January 30, 1961

COUNTY BOARDS OF PUBLIC INSTRUCTION
MILEAGE COMPENSATION—ESCAMBIA COUNTY—CHAP-
TERS 26392, 1949, 57-1003, LAWS OF FLORIDA; §§230.021,
112.061, F. S.

To: Bryan Willis, State Auditor, Tallahassee

QUESTION:

Should the members of the board of public instruction of Escambia county receive mileage for attending meetings under Ch. 26392, 1949 (extra session) or §230.201, F. S.?

It is the opinion of this office that §230.201, F. S., is determinative of the mileage compensation for members of the board of public instruction of Escambia county.

Section 230.201, F. S., was enacted in 1955, with the apparent intent of the legislature to make uniform the compensation of county school board members. In 1951 Escambia county increased its instructional units sufficiently to come within the limitations of Ch. 26392, 1949, and was still within these limitations in 1955 when §230.201, F. S., was enacted. Whether or not Ch. 26392 is a population act or a general law with limited application, does not affect the opinion that §230.201, F. S., is controlling.

Subsequent general and special laws in conflict with the provisions of this general law will of course be controlling as to this 1955 general act, and Ch. 57-1003 is such an act. This special act, later in time, however, relates only to salary compensation and does not affect mileage compensation. Consequently the provisions of §230.201, F. S., relating to mileage compensation are still effective.

Chapter 57-1003 did not repeal Ch. 26392, 1949. The provisions of this special act provided for the repeal of Ch. 23698, 1949. This is obviously an error as Ch. 23698 is a 1947 act and does not relate to this subject matter. However, it is apparent that the intent of the legislature was to repeal Ch. 26398, 1949, said act being a population act relating to the salary compensation of school board members and applicable at the time of its enactment only to Escambia county. Chapter 26398, 1949, was never effective because at

the time of its effective date, Jan. 1, 1951, Escambia county was no longer in the population brackets delineated in said act.

It is therefore the opinion of this office that although Ch. 26392, 1949, (extraordinary session) has never been specifically repealed, §230.201, F. S., is controlling as to mileage compensation for members of the board of public instruction of Escambia county, such mileage compensation being 7½¢ per mile for travel in the county and 10¢ per mile for travel without the county. It should be noted that the subsistence provisions of §112.061, F. S., are applicable for travel without the county.

061-15—January 30, 1961

LEGISLATION—POPULATION CLASSIFICATION
EFFECTIVE DATE OF 1960 FEDERAL CENSUS—STATUTES
BASED ON POPULATION CLASSIFICATION—§§34.20
AND 34.21, F. S.

TO: *Bryan Willis, State Auditor, Tallahassee*

QUESTION:

When the provision governing the salary of the judge of the county court is changed from §34.20 to §34.21, F.S., by the result of the 1960 census, on what date is the change effective?

Sections 34.20 and 34.21, F. S., fix the compensation of the judge of the county court. Under §34.20, the judge of a county court in any county having a population of *less* than 24,000, according to the latest census, receives a salary of \$1,800 per annum. Under §34.21 where the population *exceeds* 22,000, the judge of the county court in each county affected, received an annual salary of \$1,200 per annum.

With the completion of the federal census, the population of many of the counties has increased; consequently in those counties whose population now exceeds 22,000 inhabitants, based on the 1960 census figures, the salary of the judge of the county court will be governed by the provisions of §34.21 except where changed by special act.

In AGO 060-154 (Sept. 15, 1960), I held that the effective date of the current, regular 1960 census is the date of the final official publication, promulgation, or announcement. The foregoing is reflected by numerous court holdings, and appears to be the majority rule (42 A.L.R. 2d 1353-1373).

The final 1960 publication census statistics for the state were officially published by the U. S. Dept. of Commerce, Bureau of the Census, on Nov. 25, 1960 (U.S. Dept. of Commerce Report No. PC (A1) - 11, Nov. 25, 1960).

Your question is, therefore, answered as follows: The change of the salary of the judge of the county court under §§34.20 and 34.21, pursuant to an increase or decrease in population as reflected by the 1960 census, will be effective as of Nov. 25, 1960.

061-16—January 31, 1961

**COUNTY ORGANIZATION—COUNTY OFFICERS
COUNTY ROAD CONTRACTS—AWARD BY SPECIAL ROAD
COMMITTEE CONSISTING OF MEMBERS OF BOARD OF
COUNTY COMMISSIONERS—§125.08, F. S.**

To: Paul E. Sawyer, County Attorney, Key West

QUESTION:

May a committee, comprised of members of the board of county commissioners, legally award county road contracts?

You advise that as to road contracts, when the bids are opened on road work, a motion is made by one of the commissioners, duly seconded and voted upon by the whole commission or a majority in attendance, to refer the awarding of the contract to the road committee, with power to act—the members of said committee being members of the board of county commissioners. The committee then awards the contract to the most reliable lowest bidder, and at a later meeting reports its action to the board, at which time the action taken is placed in the minutes of the meeting.

You also call our attention to the following statement from the county commissioners' manual:

A board cannot lawfully perform any official functions except at and in a meeting of the board, *or when duly authorized by resolution or motion adopted at a meeting of the board.* (Emphasis supplied).

citing footnote 326 on p. 37 thereof.

It would appear that the resolution or motion adopted at a meeting of the board referred to above, relates to the calling of a special meeting as distinguished from referring matters governmental to a committee for action. It is clearly the settled law of this state that "the board of county commissioners can only contract in the county of its domicile and when acting in a regular or special meeting." (*County of Okeechobee v. Florida Nat'l Bank of Jacksonville*, 150 So. 124).

In addition, your attention is invited to *Crandon v. Hazlett*, 26 So. 2d 638, which unquestionably rules out the authority of boards of county commissioners to delegate any governmental function.

Notwithstanding opinions of my predecessors in office to the contrary, the following comments and authorities which I have expressed on various occasions in response to inquiries similar to yours, indicates a serious question as to the legality of the procedures which the board of county commissioners of Monroe county apparently have been following for some time.

It is well established that special meetings of the board of county commissioners may be held in addition to the regular meetings of said board. There is no requirement as to the time when special meetings may be held so long as they are held in the county seat and are open to the public (*Douglas v. County Commissioners of Baker County*, 2 So. 776, 23 Fla. 419).

The requirement that meetings of the board of county commissioners be held in public, when transacting the official business of the county, is in accordance with the spirit of our constitution and statutes. In keeping with this fundamental policy the meetings of the board of county commissioners must be conducted at

a known place in the county seat, and although members of such boards may meet in other places for the purposes of investigating matters under consideration, and for the purpose of discussing matters which may come before such boards for disposition when such boards assume to take official action involving public rights, that action must be taken in the county seat and in a place open to the public (*Motes v. Putnam County*, 196 So. 465, 143 Fla. 134).

While there is no statutory requirement that notices of a special meeting be given to the public generally, I am of the opinion that it is in keeping with a strong public policy of this state that some reasonable notice be given to the public so that they might attend such a meeting if desired, unless the requirements of some emergency dictates otherwise.

The board of county commissioners of the several counties, as the governing authority of the county, are expressly and by implication given the power to contract on behalf of the county. In the exercise of this power said board must of necessity and in keeping with certain statutory provisions make determinations involving a degree of discretion; viz., competitive bidding (§125.08, F. S.). The exercise of the power to contract and the use of discretion in connection therewith is fundamentally the performance of a governmental function. Such power may not be delegated to the clerk of the circuit court as secretary of said board.

However, there are certain instances where the signature of the clerk of the circuit court, as secretary of the board of county commissioners, affixed to a written instrument may create a binding obligation on the county. For example, when the board of county commissioners in a properly called public meeting has enacted a resolution accepting a proposed contractual arrangement, and in addition to the acceptance therein has directed the clerk as secretary to the board to reduce the arrangement to writing in accordance with the provisions of the resolution, and to sign said instrument on behalf of the board as their agent, valid court obligation would result.

A contract prepared in accordance with the above example would be binding on the county because the contract actually sprang into being at the time of its acceptance by resolution of the board, with nothing left to be done but reduce said agreement to writing.

In this situation the board itself has exercised its power to contract and the signature of the clerk as secretary for the board is the performance of a ministerial function as agent of said board.

The question presented is thus answered in the negative.

061-17—January 31, 1961

TAXATION

INTANGIBLE PERSONAL PROPERTY TAXES—VENDORS LIEN, UNPAID PURCHASE PRICE—CH. 199, §199.02, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where the unpaid balance of the purchase price of realty is secured by a vendor's lien reserved in the deed, is the obligation an intangible within the purview of Ch. 199, F.S.?

The deed conveying certain realty within this state recites that it was given subject to an unpaid balance of the purchase price in a specified amount, and further "reserves unto grantor vendor's lien on the above described property in the sum of (unpaid balance of the purchase price) for unpaid balance of the purchase price of said land with interest thereon from date until paid Grantee by the acceptance hereof agrees to the reservation of said vendor's lien and to pay said unpaid balance of purchase price and interest" In this state where a grantee accepts a deed poll, "knowing that it contains a covenant that the grantee assumes a specific indebtedness against the lands as a part of the purchase price, renders himself liable to pay the debt as effectually as if he had agreed to pay the same by indenture executed under his own hand and seal." (See AGO 061-8 of Jan. 23, 1961.). The grantee by accepting the conveyance containing the said covenant became personally bound to pay the same. The assumption and agreement to pay was as effective as the obligation under a promissory note or other written obligation to pay money.

The provision for the payment of the balance of the purchase price of the property conveyed, and the vendor's lien securing the payment of the same, is a valuable asset of the vendor and one that may be sold and transferred by him. It is an obligation for the payment of money secured by a lien upon real property situated in Florida. It is class "C" intangible personal property within the purview of §199.02, F. S., and subject to taxation as such upon the recordation of the deed of conveyance.

The above stated question is answered in the affirmative.

061-18—February 1, 1961

COUNTY OFFICERS AND REGULATIONS

FINANCIAL INTEREST OF COUNTY SCHOOL BOARD MEMBER—PURCHASE OF REAL PROPERTY—§§230.23(10) (i), 839.08, 839.09, F. S.

To: *Ralph B. Wilson, St. Lucie County Attorney, Fort Pierce*

QUESTION:

May a county school board purchase land for the site of a school through a real estate agent whose wife is a member of said board if the husband is paid a commission on the transaction?

Section 230.23 (10) (i), F. S., provides:

The county board, acting as the board, shall ... contract for material, supplies and services needed for the county school system; provided that no contract for supplying these needs shall be made with any member of the county board, with the superintendent, or with any trustee in the county, or with any business organization in which any county board member, a county superintendent or any trustee has any financial interest whatsoever, except that any trustee may submit sealed competitive bids and be awarded a contract as provided by law for the lowest and best bid. (Emphasis supplied).

See also §§839.08 and 839.09, F. S., which provide a criminal penalty for the purchase of supplies, goods or materials by state or county boards from any firm in which a board member has either a direct or indirect interest.

A real estate agent in pursuing his profession is rendering or performing a service. The above statute would, therefore, in the opinion of this office, prohibit a school board member from being a real estate agent in any transaction involving the board on which he serves. It is our opinion that the legislature intended the above cited restrictions to have a broad application to any transaction in which the board member might reasonably be assumed to profit either directly or indirectly. It is our opinion that normally a husband or wife would benefit financially from any transaction profitable to his or her spouse. The proceeds or profits would inure to the enlargement of the joint estate of the husband and wife and would at least indirectly result in a financial benefit to the board member whose spouse made a commission on real estate he or she sold to the board. This is particularly applicable, we think, since county boards do not have to acquire real estate through competitive bids as they do in the purchase of supplies.

Your question is answered in the negative.

061-19—February 2, 1961

**STATE OFFICERS AND EMPLOYEES
OVERTIME WORK—PAYMENT—§11, ART. XVI, STATE
CONST.**

To: Thomas D. Bailey, State Superintendent of Public Instruction
QUESTIONS:

1. Is there any legal prohibition in state law against payment for overtime work to employees of the division of vocational rehabilitation of the state department of education?

2. If the answer to question 1 is affirmative, is there any process short of legislation by which overtime payment might be handled?

3. If the answer to question 1 is negative, would the absence of specific prohibition of overtime payment in state law make it possible for authorization for overtime payment to be issued by the cabinet or budget commission or some other entity of state government?

4. Would the absence of specific provisions for overtime pay in the "attendance and leave regulations" adopted by the cabinet on Feb. 26, 1957, prohibit a cabinet member from authorizing overtime pay for a segment of the department under his administrative control?

The opinion of this office relative to the questions above is as follows:

1. There is no specific legal prohibition in state law against payment for overtime work. However, to be compensable such overtime work should be approved beforehand in order to comply with §11, Art. XVI, State Const., which provides in part:

No extra compensation shall be made to any officer, agent, employee, or contractor after the service shall have been rendered or the contract made; . . .

2. No opinion is necessary, since the opinion as to question 1 is in the negative.

3. Question 3 is answered in the affirmative, subject to the discussion relating to the contractual arrangement set forth in my answer to question 4.

4. It is the opinion of this office that the absence of specific provision for overtime pay in the "attendance and leave regulations" would prohibit a cabinet member from authorizing overtime pay for a segment of the department under his administrative control, unless such overtime payment was made on a contractual basis, said contract or agreement for compensation on an hourly basis being entered into prior to the performance of said overtime work.

061-21—February 3, 1961

ELECTION CODE

ELIGIBILITY TO REGISTER ABSENTEE WHILE STATIONED OUTSIDE THE STATE—CH. 59-217, LAWS OF FLORIDA (§§97.063, 101.693, F. S.) §101.691, F. S.; §2, ART. VI, STATE CONST.

To: *Tom Adams, Secretary of State, Tallahassee*

QUESTION:

Are persons other than those in the armed forces while in the active service stationed outside the state, and their spouses, entitled to the privilege of absentee registration under the provisions of Ch. 59-217?

Chapter 59-217 was enacted to implement the newly adopted part of §2, Art. VI, State Const., which was ratified at the general election held on Nov. 8, 1960. The amended portion of §2, Art. VI, State Const., provides:

The legislature may provide for the registration of electors who are members of the armed forces, and their spouses, living outside the territorial limits of the state. (Emphasis supplied.)

Legislative intent is the pole star by which the courts will be guided in construing statutory and constitutional provisions (Florida State Racing Commission v. McLaughlin, Fla., 102 So. 2d 574; Ervin v. Peninsular Tel. Co., Fla., 53 So. 2d 647; Smith v. Ryan, Fla., 39 So. 2d 281; State ex rel McKay v. Keller, 140 Fla. 346, 191 So. 542). In this instance, it appears from the constitutional provision quoted above that it was the legislative intent to provide a method of absentee registration for members of the armed forces and their spouses only.

Such an intent becomes further apparent from the reading of §1 of Ch. 59-217, which provides:

Members of the armed forces while in the active service, and their spouses, shall be entitled to register absentee.

While the state constitution is a limitation on the powers of the legislature rather than a grant (Pinellas County v. Laumer, Fla., 94 So. 2d 837; State v. Johns, 92 Fla. 187, 109 So. 228; City of Hernando v. Robertson, 97 Fla. 1083, 125 So. 529) some limitations can be expressed through inference (City of Miami Beach v. Crandon, Fla., 35 So. 2d 285; Harry E. Pettyman, Inc. v. Florida Real Estate Com., 92 Fla. 515, 109 So. 442, 445; State v. Board of Public Instr. for Dade County, 126 Fla. 142, 170 So. 602). In this instance it appears that by providing specifically for absentee registration for service personnel and their spouses the constitution inferentially prohibits absentee registration for other classes of individuals.

At the outset it would appear that it was the intent of the

legislature to limit absentee *registration* to members of the armed forces and their spouses when it enacted §1 of Ch. 59-217 which is quoted above.

Section 3 of Ch. 59-217, however, would at first blush seem to go beyond the implications of the constitutional limitation by authorizing other groups, in addition to service personnel, the privilege of absentee registration where it says:

The federal post card application, as provided for by any federal law, shall be accepted as an application for absentee registration and an absentee ballot when duly executed by one of the persons covered in §101.691. . . .

The persons covered in §101.691, F. S., in addition to members of the armed forces and their spouses, are members of the merchant marine of the U. S., their spouses and dependents (§101.691 (2)), civilian employees of the U. S. in all categories serving outside the U. S., their spouses and dependents (§101.691 (3)), and members of religious groups or welfare agencies assisting members of the armed forces, their spouses and dependents (§101.691 (4)).

To construe §3 quoted above as permitting absentee *registration* for the groups mentioned in §101.691 (2)-(4), F. S., would seem inconsistent with the intention of §1 of the same act and §2, Art. VI, State Const., as amended. In this connection it would seem proper to refer to the rule that all statutes and constitutional provisions should where possible be read in *pari materia* (American Bakeries Co. v. Haines City, 131 Fla. 790, 180 So. 524).

In reading §§1 and 3 of Ch. 59-217 together it comes to our attention that §3 refers to the use of the federal post card application for both absentee *registration* and absentee *balloting*. In reading these two sections together so as to avoid an inconsistency it would seem logical and necessary to assume that it was the intent of the legislature to grant to the members of the armed forces the privilege of using the federal post card application for both absentee *registration* and absentee *balloting* and to further grant the privilege of using the federal post card application for absentee *balloting* to the additional groups referred to in §101.691 (2)-(4), F. S. To hold otherwise would in effect result in broadening the provisions of the recent constitutional amendment to §2, Art. VI, and such a liberal construction would be contrary to the rules of statutory construction as they relate to absentee voting. Absentee voting was unknown at common law and, therefore, the courts have repeatedly held that statutory provisions authorizing this procedure be strictly construed (McDonald v. Miller, Fla., 90 So. 2d 124). Absentee registration also being unknown at common law and being closely akin to absentee balloting, we are inclined to apply the same rule of strict construction in interpreting statutes relating to absentee *registration*.

Accordingly this office is inclined toward the position that §3 of Ch. 59-217 when read in conjunction with §2, Art. VI, and §1, Ch. 59-217, was *not* intended to authorize absentee *registration* for persons other than members of the armed forces living outside the territorial limits of Florida and their spouses.

Your question as set out above is therefore answered in the negative.

061-22—February 6, 1961

SENTENCES AND JUDGMENTS

SUSPENSION OF EXECUTION OF SENTENCE—INTERMITTENT INCARCERATION—§§948.01, 919.23(1), F. S.

To: Jack A. Falk, Judge, Criminal Court of Record, Miami

QUESTION:

Under existing Florida Statutes, may a judge legally sentence a person to the county jail for a specified period, and allow him to leave same each day to work at his regular outside job with the requirement that he return to jail each night and there remain until the following morning?

Within the limitations therein provided, §948.01, F. S., empowers the courts of this state to suspend *imposition* of sentence and place a defendant on probation, if it appears to the court from consideration of all the circumstances that such treatment will be to the best interests of society and of the defendant.

In the event a court in any given situation decides against granting probation, as we commonly understand the term to imply, and proceeds to sentence a defendant as posed in the above stated question, it is my view that we are no longer concerned with the court's power to suspend imposition of sentence, but rather with the court's power to suspend the execution of a sentence already imposed. That a distinction exists between the two, see *Tanner v. Wiggins*, Fla., 45 So. 459.

In the *Tanner* case, *supra*, the supreme court held that it is within the power of a trial court to suspend imposition of sentence, but, it has no power to suspend the execution of a sentence already lawfully imposed except for the purpose of giving effect to an appeal or where cumulative sentences are imposed, and perhaps in some cases of necessity or emergency. (Also, that upon adjudication of guilt, a defendant should either be sentenced or placed on probation, unless delay in following either of these courses might be justified because of procedural steps, see *State v. Bateh*, Fla., 110 So. 2d 7, and cases cited therein.)

With reference to what is now part of §919.23(1), F. S., the syllabus by the court, in the case of *State v. Horne*, Fla., 42 So. 388, reads as follows:

Under a statute which provides that, "in all cases, the court shall award the sentence and shall fix the punishment or penalty prescribed by law," the power of the court extends to fixing the punishment; that is, the length of time within the given maximum a prisoner should be imprisoned. The law does not contemplate that the court, in fixing the punishment, shall also fix the beginning and end of the period during which the imprisonment shall be suffered. The time fixed for executing a sentence or for the commencement of its execution is not one of its essential elements, and strictly speaking, is not a part of the sentence at all. The essential part of the sentence is the punishment, including the kind of punishment and the amount thereof without reference to the time when it shall be inflicted. The sentence with reference to the kind of punishment and the amount thereof should, as a rule, be strictly executed. But

an order of the court, with reference to the time when the sentence shall be executed, is not so material. Expiration of time without imprisonment is in no sense an execution of the sentence.

In light of the above stated, and the decisions reached in the very few cases dealing directly with the power of a court to impose sentence providing for intermittent incarceration, my views, that it would seem to be the rule, if any can be drawn from such scant authority, that a court does not have the power to provide for intermittent incarceration in the sentence it imposes, are well supported by the annotation found in 39 A.L.R. 2d p. 985. The above question is, therefore, answered in the negative.

061-23—January 8, 1961

REGULATION OF TRADE AND COMMERCE
RETAIL INSTALLMENT SALES—STAMP TAXES—§§520.30-520.42, 201.08(2), F.S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. Are the documents and forms, used by a retail dealer in this state, exhibited with the request for opinion, within the retail installment sales act, and if so, do they conform to its requirements?
2. What is the intent and purpose of the minimum time price differential of \$15 as contained in §520.34(4) F.S.?
3. Are the total charges on all sales made under one five months contract limited to the annual rate of 10% of the principal balance, or \$15, whichever is the greater, regardless of the length of time during which the several sales were made?
4. Should documentary stamp taxes be affixed to each sales slip, or does §201.08(2), F.S., apply?

There were submitted with your request for opinion the following document forms, used by a retail seller in this state in connection with its installment sales: (1) A so-called "retail installment contract," bearing blanks for an account number, date, and name and address of the seller, with blanks for buyer's signature and address, together with the notice to buyer required by §§520.34 and 520.35, F. S. There is printed upon this document the following: "This contract shall apply to all retail installment transactions between us. Each purchase by me will be recorded on your forms furnished to me including charge sales slip, account book, and other written statements (if any). They will set forth a description of the goods I purchase, the cash sales price, the amount of the down payment (if any), the difference between these two, the amount of the service charge, the total charges and the balance due. Such forms shall, combined with this document, constitute the retail installment contract for each purchase. I may elect to pay the balance due in not more than five monthly payments, each as shown in my account book." (2) A document purporting to be a sheet from an account book, there appearing on the top of same a blank for the amount of payment and whether weekly, semi-monthly or monthly payments, and the dates for such payments. There are 36 blank spaces on this sheet for the entry of charges

and the dates thereof. This form seems to contemplate an account in the nature of a running account. There is also before us what appears to be a customer's duplicate of the account book sheet.

(3) There are also forms of charge or sales slips for use in connection with individual sales, having blanks for the entry of the customer's name, store number, account number, date, charges, credit, charge, etc., and customer's signature. The service charges seem to total about 15% of the purchases, including sales taxes, if any.

The retail installment sales act regulates both retail installment contracts and revolving accounts, as defined in §520.31, F. S. Under said section a *retail installment contract* means "an instrument or instruments reflecting one or more retail installment transactions entered into in this state pursuant to which goods and services may be paid for in installments." However, this statutory definition "does not include a revolving account or an instrument reflecting a sale pursuant thereto." From this it appears that a retail installment contract may consist of one or more instruments or documents. A revolving account is also defined by said §520.31 as meaning "an instrument or instruments prescribing the terms of a retail installment transaction which may be made thereafter from time to time pursuant thereto, under which the buyer's total unpaid balance thereunder, whenever incurred, is payable in installments over a period of time and under the terms of which a time price differential is to be computed in relation to the buyer's unpaid balance from time to time." It also appears that a revolving account usually consists of two or more sales transactions. A retail installment transaction means "a contract to sell or furnish, or the sale of or the furnishing of goods or services, by a retail seller to a retail buyer pursuant to a retail installment contract or a revolving account."

We gather from these statutory definitions that the main distinction between a retail installment contract and a revolving account thereunder is that in a retail installment contract the purchase price of each purchase thereunder is to be payable in installments, from month to month or some other regular period (see §520.35, F. S.), the time price differential being calculated at the time of purchase and the time of payment determined; while in a revolving account "the buyer's total unpaid balance thereunder, whenever incurred, is payable in installments over a period of time," upon which the time price differential "is to be computed with relation to the buyer's unpaid balance from time to time," computed from month to month or some other regular period.

The documents and forms above described, when used in connection with retail installment transactions, are clearly within the purview of §§520.30-520.42, F. S., whether their use be in connection with retail installment contracts or revolving accounts within the purview of the definitions contained in said §520.31, F. S. These observations answer question 1 in the affirmative, when such documents are used in connection with a retail installment contract or revolving account.

Question 2 involves the construction of the last sentence in §520.34(4), F. S., which provides that "notwithstanding the other provisions of this subsection, a minimum time price differential of \$15 may be charged, received and collected with respect to any retail installment contract." The phrase *retail installment contract*, as used above means "an instrument or instruments reflecting one

or more *retail installment transactions* entered into in this state pursuant to which goods or services are paid for in installments." A retail installment transaction is "a contract to sell or furnish or the sale of or the furnishing of goods or services by a retail seller to a retail buyer pursuant to a retail installment contract." The above references demonstrate that a retail installment contract may consist of one or more documents reflecting one or more retail installment transactions. Contracts may consist of more than one writing which, when considered together, show the parties, the subject matter, the terms and the consideration of the contract (17 C. J. S. 408, §58). For there to be a contract there must be a meeting of the minds; until the parties understand alike there can be no assent, and, therefore, no contract (17 C. J. S. 359, §31). The intent and purpose of the so-called "retail installment contract," the forms for an account book and the sales slips or receipts, must be gleaned from such documents themselves, together with such other evidence as may be necessary to explain any ambiguities therein. It is provided in the form entitled "retail installment contract" that "this contract shall apply to all retail installment transactions between us," and that "each purchase by me will be recorded on your forms furnished to me including charge sales slips, account book, and other written statements (if any) . . . such forms shall, combined with this document, constitute the retail installment contract for each such purchase." Under the terms of this retail installment contract form the purchaser may elect to pay "the balance due in not more than five monthly payments . . .," evidently as to each purchase.

The account book forms seem to have space on each sheet for 36 charge items, indicating an account having some features of a running account. We have before us three charge tickets or receipt forms reflecting purchases, one reflecting a purchase of \$33.35, tax of \$1.00 and a service charge of \$5.29, the second a purchase of \$4.98, tax 15c, and a service charge of 79c, and the third a purchase of \$19.99, tax 60c, and a service charge of \$3.04. So far as we are advised the purchase price conformed to the requirements of the law . . . In each of these cases the service charge is in excess of 15% of the purchase price. This is in excess of the right under §520.34(4), F. S., to charge \$10 per \$100 per year on the principal balance, that is, 10% per annum. Sections 520.30-520.42, F. S. (Ch. 59-414) was doubtless enacted under the police power of the state as a regulation of the installment sales business in the state. The legislature has the power, under the police power of the state, to regulate the businesses and occupations (16 C. J. S. 925-934, §188) when deemed necessary or proper for the preservation of the general welfare (16 C. J. S. 917-919, §182), public order (16 C. J. S. 922 and 923, §185), or the prevention of fraud (16 C. J. S. 924 and 925, §187). The Ohio court, in *Teegardin v. Foley*, 166 Ohio St., 449, 143 N. E. 2d 824, text 827, stated that the Ohio statute was designed "to correct certain abuses existing in the field of dealer participation in the field of sales made on the installment plan, which were common" in certain areas of the state. Sections 520.30-520.42, F. S., appear to have been authorized as a valid regulation of the installment sales business in this state. "It is presumed that the legislature, in enacting a regulatory measure, had adequate knowledge of the evils to be corrected and did not act arbitrarily or unreasonably" (16 C. J. S. 448, §100). The statute being enacted for the welfare and protection of the

buying public must be construed in that light.

The legislature, by the provision in §520.34(4), F. S., for a "minimum time price differential of \$15" doubtless had in mind the expenses of maintaining an installment account, in the nature of bookkeeping, records, notices, etc., and intended that the said minimum charge be permitted to cover such expenses in connection with small accounts. This is not an additional charge, but a minimum for the time price differential when the time price differential of \$10 per \$100 per year on the principal balance for the retail installment contract established between the seller and the purchaser amounts to a lesser sum. Where the time price differential of "\$10 per \$100 per year" does not produce, during the life of the retail installment contract, the sum of \$15 the difference may be charged to the purchaser. What is in fact a single retail installment contract may not be broken up into two or more such contracts merely and only for the purpose of producing more compensation to the seller. We do not think that each of the charge or receipt tickets tendered us, above described, may be considered separate retail installment contracts when other purchases are made within reasonable times and in reasonable order. The retail installment contract form and other documents tend to indicate that a series of purchases thereunder are to be considered a single contract. In order that there be a contract the parties must have a distinct intention common to both, and without doubt or difference; until all understand alike there can be no assent and, therefore, no contract (17 C. J. S. 359, §31).

These observations seem to point out the intent and purpose of the minimum time price differential of \$15 as contained in §520.34(4), F. S., so that the answer to question 2 as well as a general answer may not be given thereto, without consideration of all applicable facts.

As to question 3, we do not think that a retail installment contract, where the balance due on purchases are payable in not more than five monthly payments, is of necessity limited to a life of five months. When the documents before us are considered and construed together the reference to payment in not more than five monthly payments has reference to the time within which purchases may be paid when made under a retail installment contract and not the life of the contract. These observations are made concerning the documents and papers exhibited to us and may or may not be applicable to other groups of documents, depending upon the facts involved. Under the retail installment contract form before us it may be the basis for what in effect may be a running account, each purchase being paid in full within not more than five months. Under these assumptions question 3 is answered in the affirmative, subject, however, to the \$15 time price differential applicable to each installment contract as above defined.

The retail installment contract form and other documents handed us and considered as aforesaid doubtless, being signed by the buyer, constitute written obligations to pay money within the purview of §201.08, F. S., and seem to be within the purview of subsection (2) thereof, such retail installment sales contract being written obligations to pay money in connection with sales made under retail charge account services, incident to sales which are not conditional in character. These observations seem to answer question 4 above.

061-25—February 10, 1961

**COUNTY OFFICERS AND REGULATIONS
PAYMENT FROM COUNTY FUNDS OF TRAVEL EXPENSES
OF MEMBERS OF BOARD OF COUNTY COMMISSIONERS
TO STATE ASSOCIATION OF COUNTY
COMMISSIONERS MEETINGS**

To: *E. R. Hafner, Executive Secretary, State Association of
County Commissioners, Tallahassee*

QUESTION:

**May the members of a board of county commissioners
be reimbursed from county funds their travel expenses
incurred in connection with their attendance at meetings
of the state association of county commissioners?**

It is my understanding that the state association of county commissioners is an organization which includes all county commissioners of the state in its membership; that the purpose of said association is to provide and facilitate primarily an exchange of ideas relating to the administration of county government among its members. I am told, and have observed, that this is accomplished by the association holding semiannual conventions of two or three days' duration, at which timely questions concerning county government in Florida are discussed by panels of experts in particular fields.

In addition, I am familiar with the recent school which the association conducted in Tallahassee for the purpose of assisting newly elected county commissioners to become familiar with the authority, duties, and responsibilities of their offices.

In AGO 058-278 appear the following comments which, in my opinion, apply to the expenses of county commissioners attending state association of county commissioners' meetings.

An injunction to restrain payment of the expenses of representatives of the board of county commissioners in attending hearings held before the state road department outside their county was denied in the case of *Adams v. Lott*, 150 So. 596, 112 Fla. 489. The court pointed out that in the absence of charges and proof of facts tending to show fraud or abuse committed by the board or its committee under the guise of incurring an ostensibly authorized expenditure for a county purpose, that the injunction was properly denied.

In AGO 054-92, I pointed out that the clerk of the circuit court's expenses in connection with his attendance at a county clerks association convention were properly charged to the clerk's office and that unless the clerk's travel was on *behalf of and under the direction of the board of county commissioners*, there was no authority by which such expenses could be paid by that board. Similar problems are also considered in AGO 056-178, 056-320, 056-323, and 058-89.

In AGO 056-178 and 058-89, we pointed out that:

If the meeting is a mere social function, little, if any, benefit will flow to the county by reason of the attendance of county officers; other types of meetings may or may not be beneficial, depending on their nature and the problems studied and considered. We do not think that it follows as a matter of law that the attendance of county

officers at such meetings is ipso facto beneficial to the county; but before such expenses may be paid from public funds, there must be a showing made by the officer, claiming expenses from public funds, of benefits flowing to the county by reason of his having attended such a meeting.

In connection with your inquiry, as in the aforementioned attorney general opinions, the ultimate test as to whether the expense of attending various meetings of county officer associations may properly be paid by the county, is whether a beneficial county purpose is served, as distinguished from some other purpose. Such determination is one to be made primarily by the exercise of sound discretion of the attending official, for he, better than any other, is familiar with the problems and duties considered as they relate to his particular county.

In view of the purpose of the state association of county commissioners to create among its members a better understanding of all phases of county government, it would appear that the semi-annual conventions, the schools, and other functions of said association in furtherance of that purpose, serve a valid county purpose in that they contemplate a more orderly and uniform administration of county affairs. Therefore, I am of the opinion that if the board of county commissioners deem it in the best interest of their county, that they or representatives of said board attend such functions, the board would be authorized to reimburse the county commissioners attending such functions reasonable travel expenses thereby incurred; provided, of course, that funds for such purposes are included in the county budget.

While there is no general law placing a limitation on the amount of such travel expenses, it is my understanding that the travel expenses of county commissioners is, in some counties, limited by special legislation or by policy of the board, expressed in a resolution of the board. In those counties where such limitations exist, they, of course, would be controlling.

Subject to the above provisions, your question is answered in the affirmative.

061-26—February 16, 1961

REGULATION OF TRADE AND COMMERCE
FLORIDA RETAIL INSTALLMENT SALES LAW—CONSTRUCTION OF §520.31 (1), F. S.—§§520.30-520.42, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

What is included in the phrase "personalty sold by a manufacturer or wholesaler for commercial or industrial use," as used in §520.31, F.S., relative to goods and things subject to Florida's retail installment sales act?

Subsection (1) of §520.31, F. S., defines the term "goods" as used in Florida's retail installment sales law (§§520.30-520.42, F. S.) as meaning, "all personalty, including certificates or coupons issued by a retail seller exchangeable for personalty or services, *but not including* other choses in action, *personalty sold by a manufacturer or wholesaler for commercial or industrial use, money or motor vehicles . . .*" This raises the question of what is "personalty sold by a manufacturer or wholesaler for commercial or industrial use." The key words are "manufacturer," "whole-

saler," "commercial," and "industrial." Who is a manufacturer or wholesaler, and what are commercial and industrial uses, within the purview of the said subsection? (Emphasis supplied.)

The word "manufacturer" may be defined in broad terms as being one who processes raw materials, one engaged in making materials, raw or partly finished, into wares suitable for use (55 C. J. S. 672, §1). The word "manufacture" has been defined as the production of articles for use from raw or prepared materials by giving these materials new forms, qualities, properties, or combinations, whether by hand labor or by machinery (55 C. J. S. 669, §1). The word "wholesaler" may be defined in broad terms as being one who sells to another for resale; one who sells in bulk to another who intends to revend the articles purchased; one who buys in comparatively large quantities and sells, usually in smaller quantities, but never to the ultimate consumer of an individual unit; he either sells to a jobber or to a retailer (77 C. J. S. 582, §1). Sometimes the same person, firm or corporation sells both at wholesale and at retail; selling at wholesale when he sells to another for purposes of resale, and at retail when he sells to the ultimate consumer. Whether one is a wholesaler or a retailer depends upon the facts under which the sale was made and the application of the above mentioned rules to those facts.

The word "commercial" seems to have both a broad and a narrow sense (15 C. J. S. 576; U. S. v. Public Serv. Co., CCA Colo., 143 Fed. 2d 79, text 81 and 82; Reiser v. Meyer, Mo. App., 323 SW 2d 514, text 521; Sioux Falls v. Cleveland, 75 S. D. 548, 70 N. W. 2d 62, text 64). In its broad sense it relates to substantially all business, but in its narrow sense it relates to enterprises engaged in buying and selling goods. It may be defined as of, or pertaining to, commerce (Anchorage v. Berry, DC Alaska, 145 Fed. Supp. 868). "Commerce" has been defined as the exchange of commodities (Commonwealth v. Housatonic R. R. Co., 143 Mass. 264, 9 N. E. 547; Schill v. Remington Putnam Book Co., 179 Md. 83, 17 A. 2d 175), also as "business intercourse, especially the exchange or buying and selling of commodities, and particularly the exchange of merchandise on a large scale between different places or communities." The word has also been defined as including the purchase, sale and exchange of commodities, the transportation of persons or property by land and water, and all the instrumentalities by which such intercourse is carried on. The term is not a technical, legal conception, but a practical one drawn from the course of business, and what falls within it must be determined upon consideration of established facts and known commercial methods (11 Am. Jur. 8, §4).

"Industrial" is defined in 43 C. J. S. 1 as "consisting in, or pertaining to industry; relating to industry. The term is also often employed as referring to something related to manufactures, or to the product of industry or labor." "Industry" has been defined as "any department or branch of art, occupation or business, especially one which employs much labor or capital and is a distinct branch of trade, as the sugar industry; that branch of trade employing capital and labor . . ." (43 C. J. S. 39). "Industrial" has been said to relate to manufacturers or the product of industry or labor (Louisville and Nashville R. R. Co. v. Fulgham, 91 Ala. 555, 8 So. 803, text 804).

The phrase "personalty sold by a manufacturer or wholesaler for commercial or industrial use," is limited by its association.

Sales by a manufacturer must be for either a commercial or industrial use, and sales by a wholesaler must likewise be for a commercial or industrial use to be exempt from the operation of the statute. Goods sold for industrial or commercial use must be sales by a manufacturer or a wholesaler, which does not contemplate sales at retail. Sales by a manufacturer or wholesaler are not exempt unless sold for some industrial or commercial use. Goods purchased from a manufacturer or wholesaler for purposes of resale would not be purchases for industrial or commercial use, nor would such sales constitute *retail* installment transactions. A reading of §§520.34 and 520.35, F. S., indicates an intention to regulate retail installment contracts and revolving accounts, as defined in §520.31(7) and (8), F. S. Other subsections of this section seem to relate to retail sales only, not to wholesale sales. Sales by manufacturers and wholesalers seem to be included in the act, except when the goods sold are used for commercial or industrial purposes. Whether an item sold by a manufacturer or wholesaler was intended for and put to an industrial or commercial use is largely one of evidence.

The above and foregoing is designed to furnish a rule of law for determining the answer to each problem arising, by the application of the rules of law above set out to the facts in each particular case, as determined by the comptroller personally, or by and through his agents.

061-27—February 17, 1961

TAXATION

LICENSES AND LICENSE TAXES—AMUSEMENT ENTERPRISES, SALES PROMOTION, ETC.—CH. 205, §§205.01, 205.21, 205.32, 205.60 AND 616.18, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Are enterprises operating in shopping centers for the purpose of sales promotion under the sponsorship of businessmen having places of business in such shopping centers subject to license taxes under Ch. 205, F.S., and if so, under what section or sections taxable?

The particular amusement enterprise described in the request for opinion appears to be divided into some four divisions or departments, consisting of (1) several wild animals displayed in suitable cages, which are available to the public without charge or fee, (2) carriages or other means of transportation drawn by elephants or other tamed animals, which provide rides for children and adults for a fee (charged each rider), (3) pony rides, also available for a fee, and (4) concession stands selling cotton candy, snowballs, popcorn, peanuts, and the like, also for a charge. It does not appear from the file that any of the usual games, novelty sales, or other devices or performances usually found around circuses, minstrels, carnivals, rodeos, etc., are used in connection with the enterprise in question.

Section 205.21, F. S., imposes a license tax on persons operating for profit "any game, amusement or recreational device, contrivance or facility not otherwise licensed by some other law of the state." Section 205.32, F. S., imposes a license tax on "shows of all kinds, including circuses, vaudeville, minstrels, theatrical and exhibition

giving performances under tents or temporary structures of any kind" in the state. Section 205.60, F. S., imposes a license tax on any "person engaged in the business of traveling shows, exhibitions or amusement enterprises, including carnivals, vaudeville, minstrels, rodeos, theatrical, games or tests of skill, riding devices, dramatic repertoire, and all other shows or amusements operating in tents, enclosures or temporary structures, whether covered or uncovered." Section 616.18, F. S., requires that the shows mentioned in §205.32 obtain permits from the department of agriculture as a condition to operation in this state. There may be some overlapping between §§205.21, 205.32, 205.60, F. S., and maybe other similar sections of the statutes.

It may be noted that the certain wild animals are displayed free to the public and do not appear otherwise in connection with matters for which a fee or other compensation is charged. Section 205.21, above mentioned, relates to operations for profit. Section 205.01, relating to licenses and license taxes generally, relates to businesses, professions or occupations. It was stated in *Texas Co. v. Amos*, 77 Fla. 327, 81 So. 471, text 472, that our license and license taxing laws relate to businesses, professions and occupations in the trade or commercial sense, that is, one carried on with a view of profit or livelihood. To the same effect see also *Harper v. England*, 124 Fla. 296, 168 So. 403, text 406, and 53 C. J. S. 556 and 557, §27). It is doubted that the display of wild animals without admission or other charge is a business, profession or trade, or a business carried on for profit, within the purview of the above license and license tax statutes. The rides on carriages drawn by elephants and the pony rides are for a fee and not within this rule.

Section 205.32, F. S., relates to shows of all kinds, defined as including circuses, vaudeville, minstrels, theatrical, or any exhibition giving performances under tents or temporary structures. Section 205.60, F. S., relates to traveling shows, exhibitions or amusement enterprises, which are defined as including carnivals, vaudeville, minstrels, rodeos, theatrical, games or tests of skill, riding devices, dramatic repertoire, and all other shows or amusements operated in tents, enclosures or temporary structures, whether covered or uncovered. It is noted that §205.32, F. S., then being §972, R. G. S., 1920, was not included in §38, Ch. 18011, 1937, repealing statutes and laws therein described. Section 205.60 was derived from Ch. 17758, 1937, which was not repealed by Ch. 18011, and was designed to extend the operation of §205.32, F. S., it is clear from the statutes and laws above cited and referred to that it was the legislative intent that the types of shows, exhibitions and amusement enterprises specifically referred to in said §§205.32 and 205.60, are excluded from §205.21; only those shows, exhibitions and amusement enterprises not subject to classification under §§205.32 and 205.60, or some other section of the statutes are to be classified as being under §205.21. Section 205.21 is a catchall for shows, exhibitions and amusement enterprises not within the purview of said §§205.32 or 205.60, or other applicable sections of the Florida Statutes. This being true, circuses, vaudeville, minstrels, carnivals, theatrical, rodeos, games of skill, riding devices, games or tests of skill, and other types of shows, exhibitions and amusement enterprises mentioned in said §§205.32 and 205.60, are not entitled to be licensed under §205.21, F. S.

The term *show*, as defined in Words and Phrases, and in 52

Am. Jur., §2, does not seem to relate generally to the mere furnishing of rides for children. A provision in the charter of Kansas City prohibited the giving of shows and exhibitions in the city's parks; in *Longwell v. Kansas City*, 199 Mo. App. 480, 203 S. W. 657, text 659, it was held that said charter provision did not prohibit the city from maintaining ponies for children in the city's parks. The court remarked that a "show" or "exhibition" was commonly understood to be something that one views, or at which he looks, and at the same time hears. The term *carnival* was defined in *Veterans of Foreign Wars v. Hull*, 51 N. M. 478, 188 P. 2d 334, text 335, as "an amusement enterprise consisting of sideshows, vaudeville, games of chance, merry-go-rounds, etc." In *Line Star Shows v. Commissioner*, 294 Ky. 114, 171 S. W. 2d 28, text 31, a corporation was held to have set up a merry-go-round, ferris wheel, loop plane, auto speedway, chairplane, riding devices, etc." To the same effect see also Webster's new international dictionary. *Vaudeville* has been described as a species of theatrical entertainment, composed of isolated acts forming a balanced show; a light kind of entertainment interspersed with music and having humorous or satirical allusions to current topics of the day; a dramatic piece in which there are light or comic songs, etc. (see *Hart v. B. F. Keith Vaudeville Exc.*, CCA N. Y., 12 Fed. 2d 341; and *Princess Amusement Co. v. Wells*, CCA Tenn., 271 Fed. 226, text 231; and 86 C. J. 664, §1). The term "circus" is a term well understood by the public. Minstrels are usually understood to be musical and comical performances, including negro melodies, jokes and impersonations (Webster's new international dictionary).

Although cotton candy, peanuts, popcorn and soft drinks are usually sold and furnished around circuses, vaudevilles, and theatres, and similar shows, such sales do not convert the operation of amusement devices, referred to in §205.21 into shows within the purview of §205.32 or §205.60, F. S., by reason of such sales alone. Neither would the display of wild animals without admission charge or other fee for viewing such wild animals.

Under the facts before us, the enterprise described in the above question seems to be within the purview of §205.21, and not under §205.32 or §205.60. Section 616.18, F. S., formerly §205.31, seems to contemplate those persons, organizations, etc., not only within said §§205.32 and 205.60, but also those within §205.21, F. S.

061-28—February 20, 1961

CRIMINAL PROCEDURE

SHERIFF WITHHOLDING SERVICE OF ARREST WARRANT
—§§835.19, 839.20, 30.15(3), F. S.; §15, ART. IV,
STATE CONST.

To: John A. Madigan, Jr., Attorney, Florida Sheriffs' Association,
Tallahassee

QUESTION:

May a sheriff withhold execution of an arrest warrant where restitution of moneys or goods allegedly obtained is offered, at the request of the person whose money or property has been taken?

It is fundamental that the commission of a crime is an act against the state as distinguished from an act against the person wronged by the activities of the alleged criminal. While an act of

restitution by one who has committed a crime after a warrant for his arrest has been issued, but prior to execution thereof, might be considered as a mitigating circumstance in the imposition of criminal penalties, it does not excuse acts which have occurred in violation of criminal statutes.

In AGO 046-165, 1945-46 Biennial Report, p. 733, it was pointed out that to enable a sheriff to withhold service of a warrant properly in his hand that such warrant show on its face that it was based on an invalid statute.

In AGO 047-276, 1947-48, Biennial Report, p. 40, attention was invited to §839.20, F. S., which imposes a penalty on officers authorized to serve process for willful and corrupt refusal to execute criminal process.

Your attention is also invited to §839.19, F. S., which imposes a penalty on officers for failure to serve civil process.

In addition, §30.15(3), F. S., appears to impose a mandatory responsibility on the several sheriffs to execute warrants coming into their hands to be executed in their counties.

Section 15, Art. IV, State Const., empowers the governor of the state to suspend from office for malfeasance, for misfeasance, or neglect of duty in office, all officers that shall have been appointed or elected and that are not liable to impeachment. Nonfeasance as ground for removal or suspension of an officer under this section refers to neglect or refusal, without sufficient excuse, to do that which is the officer's legal duty to do (*State ex rel. Hardie v. Coleman*, 115 Fla. 119, 155 So. 129). Neglect of duty, as ground for removal or suspension of an officer, refers to the neglect or the failure of an officer to do and perform some duty imposed by virtue of his office or required by law (*Hardie v. Coleman*, *supra*).

Thus, it appears that a sheriff's failure to serve an arrest warrant on a person who has allegedly committed a crime may constitute either nonfeasance or neglect of duty for which the governor could exercise his constitutional suspension power.

Your question is answered in the negative.

061-29—February 21, 1961

LEGISLATION

POPULATION ACT APPLICABLE TO ALL COUNTIES IN THE
STATE HAVING POPULATION OF OVER 267,000—
PROGRESSIVE LEGISLATION—§11.031(3), F. S.,
INAPPLICABLE—CH. 21013, LAWS OF
FLORIDA, 1941.

To: *Frank M. Craft, State Director, Department of Public Welfare,
Jacksonville*

QUESTION:

Is Ch. 21013, 1941, made applicable to counties having a population of over 267,000, progressive so as to be applicable to all counties having a population in excess of 267,000, according to the 1960 federal census?

The title to Ch. 21013 makes it applicable "only to counties which now have or may hereafter have a population of over 267,000." Under §1 of said act "in all counties of this state which now have, or may hereafter have, a population of over 267,000, the state welfare board in order to protect the physical and moral welfare of children shall have the authority and duty," to do, carry out and perform the matters and things therein set out and defined.

This act relates to counties with populations, at the time of the act and thereafter, of more than 267,000. Although state and federal statutes, or either of them, are not mentioned in the act, such censuses clearly show the population of counties having populations in excess of 267,000 at the time of the taking of such censuses. The reference to a population which a county may have now, or may hereafter have, is as much progressive as a reference to the last, or last preceding, federal census, which has been held to be progressive so that counties may grow into or out of such population bracket (*State v. Daniel*, 87 Fla. 270, 99 So. 804, text 809; *Waybright v. Duval County, Fla.*, 196 So. 430, text 435). Said Ch. 21013, 1941, like Ch. 9274, 1923, involved in *State v. Daniel*, appears to be a general law based upon a proper classification.

Although there was but a single county within the purview of said Ch. 21013 when it was enacted in 1941, two were within its purview under the 1945 state census, the same two within it under the 1950 federal census. It appears that five counties are within its purview under the 1960 federal census, which are Dade, Duval, Broward, Hillsborough and Pinellas counties, so as to be applicable thereto.

Subsection (3) of §11.031, F. S., is not applicable here, as will more fully appear by reference to our opinion 060-154, dated Sept. 15, 1960.

The above question is answered in the affirmative.

061-30—February 21, 1961

LEGISLATION

CONSTRUCTION OF §§27.223 AND 27.231, F. S., PROVIDING COMPENSATION OF ASSISTANT STATE ATTORNEYS— §11.03(3), F. S., INAPPLICABLE

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTIONS:

1. Are assistant state attorneys of judicial circuits of this state in judicial circuits embracing a county or counties having, under the 1960 federal census, a population of more than 260,000, entitled to be paid a salary of \$7,500 per annum?

2. If question 1 is answered in the affirmative, what was the effective date of such salary increases?

Section 27.223, F. S., provides that the "salary of each assistant state attorney for each judicial circuit shall be six thousand five hundred dollars per year, which salaries shall be paid in equal monthly installments . . . provided, however, that nothing contained in this section shall be construed to reduce the salary of any assistant state attorney, nor to affect, amend or repeal any law of this state not particularly mentioned in this section providing for salaries of . . . assistant state attorneys in excess of the salaries herein provided." (Emphasis supplied.) Specifically, said §27.223 was made applicable to the third judicial circuit notwithstanding other statutes and laws applicable to that circuit. Unless otherwise provided by some other statute or law, the salary of assistant state attorneys is \$6,500 per year.

Section 27.231, F. S., provides that "in each judicial circuit of the state, which embraces and includes a county having a population of more than two hundred sixty thousand, according to the

last preceding state census . . . the salary for each of the assistant state attorneys, for each such judicial circuit, shall be seven thousand five hundred dollars per annum, *excepting* in such judicial circuits having, embracing and including more than one county, the assistant state attorney residing and domiciled in the county having the smallest population shall receive a salary of six thousand dollars per annum." These salaries are payable in equal monthly installments. At the time of the enactment of Ch. 23640, 1947, from which §27.231, was derived, only two judicial circuits embraced and included a county with a population in excess of 260,000. Under the 1960 census, six of the circuits embrace and include counties with populations in excess of 260,000, two of which, the eleventh and thirteenth, are composed of a single county. The sixth and fifteenth circuits embrace and include but two counties each. The fourth has three counties, and the ninth eight.

The salaries of assistant state attorneys, under §27.223, F. S., are fixed at six thousand five hundred dollars per annum. Said §27.223 appears to have been in effect an amendment of §27.222, F. S., and may have repealed the same. Section 27.231 fixed the salaries of assistant state attorneys in circuits embracing and including counties having a population in excess of 260,000, at \$7,500, except in circuits comprising two or more counties, the assistant "residing and domiciled in the county having the smallest population shall receive a salary of six thousand dollars," each per annum. Unless its application is preserved by §27.223, or otherwise, §27.231, like §27.223, being a general law, and §27.223, being the later in point of time, said §27.231, was repealed by said §27.223; however, an examination of §27.223, reveals the following: "That nothing contained in this section (27.223) shall be construed to reduce the salary of any state attorney or assistant state attorney, nor to affect, amend or repeal any law of this state not particularly mentioned in this section providing for salaries of state attorneys and/or assistant state attorneys." This language seems to have preserved the operation of §27.231.

Where a judicial circuit is composed of a single county having a population in excess of 260,000, the salaries of all assistants, in the absence of another applicable statute, is fixed by §27.231 at \$7,500 per annum. However, in such circuits composed of two or more counties "the assistant state attorney residing and domiciled in the county having the smallest population shall be six thousand dollars per annum." Although under §27.223, all assistant state attorneys are paid a salary of \$6,500 per annum, we find nothing in either section of the statute making this section applicable in lieu of §27.231, where the salary payable thereunder may be less than that provided by §27.223. These observations seem to answer question 1, unless there be other applicable statutes or laws not coming to our attention, not published in the Florida Statutes.

We come now to question 2. Section 27.231 is not a population act within the purview of §11.031, F. S., (opinions of Sept. 15, 1960 (060-154), and of Jan. 30, 1961 (061-15), and, therefore, became effective at the time of the final official publication, promulgation or announcement of the census figures, which appears to have been Nov. 25, 1960. (U. S. Dept. of Commerce Report No. PC (A1)-11, Nov. 25, 1960).

061-31—February 22, 1961

**REGULATION OF PROFESSIONS AND VOCATIONS
PHYSICIANS—QUALIFICATIONS OF LICENSE—(U. S. CITIZENSHIP) REQUIREMENT FOR ANNUAL RENEWAL—
§§458.05(2) (a), 458.06(2) AND 458.15(1) (REPEALED
BY CH. 61-243), F. S.**

To: *Dr. Homer L. Pearson, Secretary-Treasurer, State Board of Medical Examiners, Miami*

QUESTION:

Does the Florida state board of medical examiners have the authority to waive the citizenship requirement of §458.05(2) (a), F.S., under the following facts and conditions as stated in your letter?

1. In 1940 the board licensed a physician who was born in the U.S. and graduated from an approved medical school in this country.

2. He later went to Cuba, gave up his U. S. citizenship, and for many years practiced as a Cuban citizen.

3. He has now returned to Florida where he desires to practice medicine as a Cuban citizen.

Section 458.05, F. S., which prescribes the qualifications of an applicant for a license to practice medicine in this state, provides in subsection (2) (a), among other things, that the applicant shall furnish evidence satisfactory to the board that he is a *citizen of the United States*.

Section 458.06(2), F. S., provides for every person licensed to practice medicine to re-register on or before Jan. 1 of each year. Section 458.15(1) provides that any licensed physician who fails or neglects to register by Jan. 1 of any year shall upon conviction be fined not more than \$50.

For the purpose of this opinion, it is assumed that (1) the physician actually gave up his U. S. citizenship and became a bona fide citizen of Cuba, and (2) that he let his medical license lapse.

In view of the foregoing, I would like to make the following observations:

1. The board does not have the authority to waive the statutory qualifications required of an applicant for a license to practice medicine.

2. It also appears from §458.06, F. S., parts of which were quoted above, that once an applicant is issued a license he is required to register annually with the state board of health.

3. In other words, it appears that a physician, who meets the qualifications prescribed in §458.05, supra, and obtains his original license, is required to keep his license or certificate of registration current by complying with the provisions of Ch. 458, F. S.

Therefore, it is my opinion that it is the intent and purpose of Ch. 458, F. S., that only citizens of the U. S. shall be licensed to practice medicine in this state. It is further my belief that his 1940 license is invalid for the reasons herein stated.

I trust the foregoing will be of some help to you.

061-32—February 22, 1961

SCHOOL CODE

COUNTY SCHOOL SYSTEM—AUTHORITY FOR NAMING SCHOOL BUILDINGS—§§230.42 AND 230.43, F. S.

To: *Thomas D. Bailey, Superintendent of Public Instruction, Tallahassee*

QUESTION:

In naming a particular school building does the authority of officially selecting and designating such name vest in the county school board or in the district trustees?

It is the opinion of this office that this authority vests in the county school board.

Section 230.42, F. S.,—general powers of trustees—provides:

The powers of the trustees shall be supervisory in nature and not administrative or controlling powers. The general supervisory powers of the trustees shall be as follows:

(1) Consult with patrons, teachers and principals. The trustees of any school district shall consult with patrons, etc.

(2) Advise with county school officials. The trustees shall advise with the county superintendent and the county board and *make recommendation with respect to the general welfare and needs of the schools for the district.* (Emphasis supplied.)

Section 230.43, F. S., provides that the specific powers and responsibilities of the trustees shall be as follows:

1. Nomination of principals.
2. Nomination of other members of instructional staff or other personnel.
3. Recommend dismissal of members of instructional staff.
4. Examine district current school fund budget.
5. Recommend tax levies.
6. To have general supervision of buildings, grounds, equipment and other property of the schools in the district and to recommend to the county superintendent or to the county board at any official meeting, such repairs and alterations as may be considered necessary.
7. Permit use of school property for other purposes.

Nothing in the above statutes gives the trustees the power, duty or responsibility to name a school building. The trustees' powers are supervisory and advisory in nature and not controlling powers, and their primary function is to make recommendations for the general welfare and needs for schools of the district.

Whereas there is no specific provision in our statutes designating which body shall name school buildings, it is the opinion of this office that the district trustees may make recommendations to the county school board relative to the naming of school buildings, but the ultimate authority for naming the buildings vests in the county school board.

061-33—February 22, 1961

CRIMINAL PROCEDURE
APPOINTMENT OF COUNSEL IN CAPITAL CASES—WHEN
AUTHORIZED—§909.21, F. S.

To: *W. Troy Hall, Jr., Circuit Judge, Tavares*

QUESTIONS:

1. Where an insolvent defendant has been arrested on a charge of having committed a capital crime, but such defendant has not been indicted or bound over to the circuit court by the committing magistrate before whom the charge is pending, does §909.21, F.S., providing for the appointment of counsel for indigent defendants in capital cases, authorize the circuit court to appoint an attorney to represent such defendant?

2. Under the circumstances set forth in question 1, does said §909.21 authorize the committing magistrate to appoint an attorney to represent the defendant?

Section 909.21, F. S., reads as follows:

909.21 *Appointment of counsel in capital cases.*— In all capital cases where the defendant is insolvent, the judge shall appoint such counsel for the defendant as he shall deem necessary, and shall allow such compensation as he may deem reasonable, such sum to be paid by the county in which the crime was committed. Counsel, so appointed, may in the event of conviction and sentence of death, appeal the case to the supreme court, and prosecute said appeal to its final conclusion with diligence; and until the supreme court has disposed of the appeal, no compensation shall be allowed to such counsel. If counsel first appointed is unable for any reason to perfect and prosecute the appeal, the court may relieve him from such duty, but shall appoint other counsel for such purpose. When counsel so appointed by the court, in capital cases, completes the duties imposed by this section, such counsel shall file a written report as to the duties performed by him and apply for discharge by the court.

The compensation of counsel for the defendant, at the trial, shall not exceed \$500; and defendant's counsel's compensation on appeal, shall not exceed \$500 additional.

This statute authorizes appointed counsel to appeal to the supreme court if there is a conviction and death sentence, and provides compensation for such counsel "at the trial" and "on appeal." The circuit court is the only court in which a trial for a capital offense may be had and is the only court in which a sentence of death may be imposed. Therefore, I conclude that the circuit court is the only court which is authorized to appoint counsel under the provisions of §909.21.

Furthermore, I do not think that said statute furnishes any authority for the appointment of counsel by the circuit court until a capital case is actually pending in that court for trial. In other words, it is my opinion that said court is without authority to appoint counsel under the statute until the defendant is indicted for a capital offense.

Consequently, both of your said questions are answered in the negative.

061-34—February 22, 1961
(ABRIDGED)

PUBLIC OFFICIALS

FLORIDA EDUCATIONAL TELEVISION—PURPOSE AND
USE—CH. 246; §§246.02, 246.05, 246.13, 770.04, F. S.

To: *Farris Bryant, Governor of Florida, Tallahassee*

QUESTIONS:

1. May the ETV facilities be used by the governor for informational reports to the people of Florida? By "reports" we have reference to telecasts in the nature of presenting a clear picture of activities of government, including the reasons for actions taken, but not advocating specific programs proposed or under consideration, other than those lying within the control and authority of the individual making the report.

2. May the ETV facilities be utilized for the presentation of the governor's news conferences?

3. May presentation be made by educational television stations of programs discussing issues of great public interest in which both sides of a question are presented on an equal basis and in which the station, or the ETV network, neither advocates nor opposes the issue discussed. For example: a program or series of programs conducted during the period in which the legislature is in session in which legislators discuss issues of the day in greater length and detail and under more formal conditions than is feasible in the limited public service programming time available on commercial television stations.

4. May presentation be made of a program or series of programs in which legislative and/or governmental agency functions are discussed by a faculty member of one of the state's recognized universities who calls upon administrators and/or legislators to cite instances from current activities to make or illustrate the points advanced?

5. Do you construe the statute relating to educational television as restricting its utilization entirely for formal educational purposes or also for the broad edification of the public generally and/or specific, sizeable segments of the population?

Our educational television system had its inception in 1957 when the Florida legislature created the Florida educational television commission (Ch. 57-312) now carried as Ch. 246, F. S. We find no Florida judicial opinions which relate to the problems you have presented and we are not aware of any litigation pending at this time in Florida which is concerned with similar issues.

Section 246.02, F. S., defines the purpose of Ch. 246, F. S., as follows:

Purpose.—The purpose of this law is to provide through educational television a means of extending the powers of teaching in public education and of raising living and educational standards of the citizens and residents of the state. (Emphasis supplied.)

Section 246.05, F. S., provides:

Board of education to supervise.—The commission shall operate under the control and supervision of the board. Subject to the approval of the board, the commission may adopt and promulgate reasonable rules and regulations consistent with law and necessary for carrying out the purpose and intent of this law.

We find no state board of education or educational television commission rules or regulations which are applicable to your question.

Section 246.13, F. S., provides:

Promotion of political and governmental activities prohibited.—None of the facilities, plant or personnel of any educational television system which is supported in whole or in part by state funds shall be used directly or indirectly for the promotion, advertisement or advancement of any political candidate for any municipal, county or state office; or for the purpose of advocating or opposing any specific program, existing or proposed, of governmental action which shall include, but shall not be limited to, constitutional amendments; tax referendums; or bond issues. Conviction upon violation of any provision of this section shall be punishable by not more than 1 year in prison or \$5,000 fine, or both such fine and imprisonment.

Although not directly related to the questions you have asked, your attention is also directed to §550.35, F. S., which governs the conditions under which all television stations can transmit information or news about racing results, and to §770.04, F. S., which deals with the civil liability of television stations for defamatory statements. Section 770.04, provides:

Civil liability of radio or television broadcasting stations; broadcasting stations; care to prevent publication or utterance required.—The owner, licensee, or operator of a radio or television broadcasting station, and the agents or employees of any such owner, licensee or operator, shall not be liable for any damages for any defamatory statement published or uttered in or as a part of a radio or television broadcast, by one other than such owner, licensee or operator, or general agent or employees thereof, unless it shall be alleged and proved by the complaining party, that such owner, licensee, operator, general agent or employee, has failed to exercise due care to prevent the publication or utterance of such statement in such broadcasts, provided, however, the exercise of due care shall be construed to include the bona fide compliance with any federal law or the regulation of any federal regulatory agency.

Educational television stations are subject to the rules and regulations of the federal communications commission. We are not aware of any FCC regulation at present that would require a negative answer to any of the questions presented in your letter.

The questions at hand, however, must be considered in the light of existing Florida law (*supra*) which places restrictions on our educational television system in addition to those imposed by federal law or regulation on commercial broadcasting stations.

You have raised the specific question of whether the rebroadcast in the manner outlined, of the governor's weekly press interview through the Florida educational television network violates the quoted provisions of law.

It is our opinion that as proposed, it would not be a violation. A press interview as conducted by the capitol press corps is not per se promotion, advertisement or advancement of political candidacies or advocacy or opposition of any specific program of governmental action. It is not the equivalent of a commercial program planned and sponsored for such purposes. On the contrary, it is a searching and critical questioning of the governor concerning a wide range of public affairs. Questions asked not infrequently are perplexing if not embarrassing. Quite true, on occasions the governor's responses to questions advocate governmental action and on one occasion, unprecedentedly, the governor expressed a political preference for a candidate. But these are incidental and in the main the governor's press conference because of the personnel of the questioners and the nature of the questions asked fall more in the objective area of public information, the dissemination of which has educational value.

Admittedly, the policy of the proposal is debatable and outside the scope of the legal inquiry. Nevertheless, we do not take an extremist view that rebroadcasting of these conferences in the manner outlined is a forerunner of improper uses of state sponsored television facilities. Educational television cannot operate effectively in an aseptic vacuum free of all political considerations. If it were so, teaching in the fields of government, political science—even of the American constitution itself and American ideologies—would be banned. What the issue is reduced to is one of degree. If educational television is perverted into an instrument for political propaganda and its intended purpose abused, then there would be cause for complaint. But we do not believe at this point the governor, the press corps or the commission would seriously consider such a perversion in the governor's press interviews. Our legal opinion is expressly limited to the examples under consideration and is not to be extended to other situations. Actually, public affairs developed in the white heat of critical questioning on television and radio has become one of the best mediums of aiding the general public in becoming conversant and knowledgeable concerning the public business. It has widespread acceptance as a highly competent and necessary method of achieving the objectives stated by Mr. Ralph Renick of station WTVJ in Miami in a television editorial on July 15, 1959, in which he said, "Our democratic society is based on the belief that the people, the so-called common man, possesses the right along with the intelligence for self-government. But common sense dictates that in order to make intelligent decisions, on any matter, a person must have the necessary facts and be conscious of the essential issues."

Although under the Florida law the stated primary purpose of educational television is the instruction of college students, the law does not restrict the authorized program solely to this function. In fact, as the program has developed during the past three or four years since its inception it has rapidly been expanded so that it is a major tool in the education of public school children, adult training, and is now providing broad educational and cultural opportunities to all citizens even though they are not enrolled in a school or formal course given for credit.

Perhaps the best definition of the function of television as a means of education is contained in the television code (March, 1959) of the national association of broadcasters. Although this code was designed for the commercial television industry, we think their

concept of educational television is equally appropriate to nonprofit corporations or governmental agencies operating educational stations on channels assigned to them for the sole purpose of providing educational opportunities. The code includes the following statement:

3. Education via television may be taken to mean that process by which the individual is brought toward informed adjustment to his society. Television is also responsible for the presentation of overtly instructional and cultural programs, scheduled so as to reach the viewers who are naturally drawn to such programs, and produced so as to attract the largest possible audience.

4. In furthering this realization, the television broadcaster:

- a) Should be thoroughly conversant with the educational and cultural needs and desires of the community served.
- b) Should affirmatively seek out responsible and accountable educational and cultural institutions of the community with a view toward providing opportunities for the instruction and enlightenment of the viewers.
- c) Should provide for reasonable experimentation in the development of programs specifically directed to the advancement of the community's culture and education.

The people of Florida can justifiably take pride in the progress which has been made in establishing this state in a position of leadership in the use of television as a means of education and yet there are many who have sincere and valid fears that this new, and still to a large extent experimental tool of education, may have hidden dangers.

The problem as we see it is how to insure adequate safeguards against the kind of political abuse or unfair competition which is feared but to also avoid unreasonable restrictive laws or interpretations of laws that would destroy or seriously impede the proper value and potential of television as an instrument of education.

The problem from both a legal and administrative standpoint is extremely difficult simply because educational television itself is something new and there is little or no precedent for guidance in any attempt to foresee its ultimate effect and importance in the field of formal education, public information or upon the social structure and economy of the nation. There is every reason to assume that within the next few years drastic improvements will be made in the machinery used in telecasting and even more important in the techniques used in presenting programs.

The situation is not unlike that which existed when the automobile first began to be made available for public use. We doubt that anyone at that time could foresee that within less than one generation the automobile would become a major factor in the family budget, the national economy, law enforcement, and would completely revolutionize the mores and social customs of the American community. Laws were enacted which sought to bar automobiles from public roads and to so restrict their speed and use, that had such laws been retained and enforced this form of transportation could not have developed.

It is entirely possible that television whether privately or publicly owned and operated may within an even shorter period of

time have a comparable revolutionary effect upon public knowledge, perception and understanding of the world in which we live.

If television has the potential for a better informed population which it now appears to have, we believe it will be the duty of both lawmakers and administrators to find ways to encourage its natural and logical progress without permitting its abuse for selfish or unworthy motives.

With these generalizations and mental meanderings in mind, we have attempted to comply with your request for a legal guide for the use of your office and other officials who may be called upon to participate in the current twilight zone of educational television. We feel certain that any specific answer we might give can be only temporary in nature, subject to change as time passes and we gain greater experience in the use and regulation of this new medium of communication.

It is of course incumbent upon every person, public official or otherwise, to obey the law of Florida and to refrain from using our educational television system for the purpose of promoting political candidates or for propagandizing either for or against governmental issues.

It is of course incumbent upon every person, public official or television station whether it is publicly or privately owned to make every reasonable effort to see that this law is not knowingly disobeyed.

We are aware that reasonable discretion must be applied in the application of these general prohibitions to the multitude of specific situations which will arise, each in some respect different from the other. Here we believe that the most important consideration is that of good faith on the part of public officials, station managers and all citizens who participate in educational television programs.

We do not believe it was the intent of the legislature to place educational television in an intellectual strait jacket so tightly laced that all objective reference to the problems of government must be choked off.

We do not presume to be informed on, or even aware of all the problems inherent in a good faith effort to avoid the unfair competitive use of educational television against privately operated news agencies. We do believe that such problems of this nature as do develop can be fairly solved as policy rather than legal decisions to be made through the cooperative efforts of those who manage our educational television stations and representatives of the press, radio and commercial television.

Subject to the above observations and outlined limitations and applied solely to the factual situations described in your letter, we believe that none of the questions as presented require a negative answer.

In other words, we do not believe that participation in an educational television program under the circumstances described in any of the situations outlined in your letter would constitute an illegal act under the laws of Florida or regulations of the federal communications commission, *unless there was a deliberate and willful attempt upon the part of the participants or of the educational television management to use the program for the purpose of influencing the public in favor of or against a political candidate or cause.*

With regard to the idea of telecasting meetings of the legisla-

ture, legislative committees, or panel discussion by members of the legislature of issues of public interest pending in the legislature as outlined in question 3, we think this primarily a question of policy to be determined by the legislature itself in cooperation with the management of educational television stations.

There is now pending in the U. S. congress a bill authorizing telecasting of congressional meetings. Other states which have embarked on an educational television program would logically attempt to provide safeguards against the abuse of the system for political purposes as we are doing but in some instances at least they have not felt that a showing of the deliberations of public boards was an improper or dangerous practice.

For example, we are advised that the educational television station in Houston, Texas, has been broadcasting the meetings of the local school board on the theory that such broadcasts would be a matter of desirable civic information and education. The broadcasts have been very successful and command a large viewing audience. Here again the question is one of good faith on the part of all concerned in avoiding the use of such programs for political purposes.

As to question 5, it is our opinion that the legislature intended educational television to be used primarily for formal educational purposes but that it intended it not to be limited to this sole purpose but to also benefit the public generally and that it may be legitimately used for this purpose.

061-35—February 23, 1961

TAXATION

MURPHY ACT LANDS — TAX CERTIFICATES — LIMITATIONS, CANCELLATION—§§194.58, 196.12, 192.38, 192.381, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Where the title to lands became vested in the state under the Murphy act consequent on a tax sale certificate issued prior to June 9, 1935, are tax sale certificates issued to the state subsequent to said June 9, 1935, subject to cancellation under §§194.58 and 196.12, F.S.?

We are advised that certain lands in Liberty county became vested in the state on June 9, 1939, under the Murphy act; however, subsequent to the issuance of the said certificate upon which the said lands became so vested, there was issued, on Aug. 1, 1938, another tax sale certificate encumbering the same lands, for 1937 taxes, and on July 1, 1940, a further certificate encumbering the same lands, for 1939 taxes, which tax sale certificates, together with the original one under which the lands became vested in the state, pursuant to §9, Ch. 18296, 1937, merged with the title thereto so that the liens thereof no longer exist as such tax sale certificates. This being true, §§194.58 and 196.12, F. S., have no application, there being no tax sale certificates or liens upon which they may operate.

If the lands described in the said tax sale certificates have not been disposed of by the state, by and through the trustees of the internal improvement fund, it would seem to be subject to sale and transfer under §192.38 or §192.381, F. S. If disposed of

under §192.381, F. S., the said tax sale certificates represent taxes "levied and assessed on said lands prior to the vesting of said title in the state," within the purview of said §192.381(2)(g).

The above observations seem to answer your inquiry and the above stated question.

061-38—March 1, 1961

CRIMINAL PROCEDURE

NON-CAPITAL OFFENSE—STATUTE OF LIMITATIONS— COMMENCEMENT OF PROSECUTION UNDER §932.05, F. S.

To: Edward M. Booth, Duval County Solicitor, Jacksonville

QUESTION:

When, within two years after the commission of a non-capital offense, an affidavit charging such offense is made before the proper committing magistrate and a warrant for the arrest of the defendant for such offense is issued by such magistrate and delivered to an officer authorized to serve it, and where the defendant is indicted or informed against for such offense more than two years after the commission thereof, does the statute of limitations bar prosecution under such indictment or information?

Section 932.05, F. S., provides that, with exceptions not here material, all offenses not punishable with death shall be "prosecuted" within two years after the same shall have been committed. This statute does not require that a non-capital offense be prosecuted by indictment or information within two years after the commission of the offense; it merely requires that the offense be "prosecuted" within such two years. I think that for the purposes of this statute, an offense is "prosecuted" when a warrant is sworn out before the proper committing magistrate and placed in the hands of an officer authorized to serve it.

This question was discussed by the supreme court of Florida in *Rouse v. State*, 32 So. 784. In that case the supreme court said:

... According to many authorities, some of which we cite, a prosecution of an offense, within the meaning of statutes like ours, is commenced when the warrant upon a proper affidavit filed is issued and placed in the hands of an officer for service, and when this is done within the time allowed for prosecutions of offenses an indictment or information followed up and based thereon may be presented and filed after the expiration of such time. Under this view the limitation is not upon the filing of the indictment or information, but upon the prosecution, which is regarded as commenced when the warrant has been placed in the hands of the proper officer for service. . . .

but later in the opinion the court apparently declined to rule on the question by saying:

It appears from the information before us that the offense was committed more than three years before it was filed, and that after the warrant was issued by the justice no proceeding was had by information for at least three years. The information does not show that it was based upon the proceedings before the justice of the peace, or had any connection whatever with it, *even if that would*

save it, which we do not now determine; and, in our judgment, the motion to quash should have been sustained, instead of denied. (Emphasis supplied.)

In *Dubbs v. Lehman*, 130 So. 36, where the information was filed more than two years after the commission of the offense, the supreme court of Florida said:

If the affidavit made by Thompson before the justice of the peace and the warrant issued thereon charged the accused with any criminal offense against the laws of the state of Florida and the record further showed that the warrant was placed in the hands of the proper officer to be executed prior to the expiration of the period of the statute of limitations, we would hold, under authority of the opinion in the case of *Rouse v. State*, 44 Fla. 148, 32 So. 784, 1 Ann. Cas. 317, and cases there cited, that the judgment of the circuit court should be affirmed.

It will be noted that this language in the *Dubbs* opinion treated the question as having been decided in the *Rouse* case, whereas, as above pointed out, the court apparently declined to rule on the question in the *Rouse* case.

In *Horton v. Mayo*, 15 So. 2d 327, a habeas corpus case, it appears that the offense was committed in 1937, that a warrant was sworn out and placed in the hands of a constable in 1939, and that the information was filed in 1942. *Horton* contended that the information was fatally defective because it alleged that the offense was committed on a date more than two years before the information was filed. In rejecting this collateral assault by way of habeas corpus, the supreme court of Florida said, among other things:

... The affidavit filed with and the warrant issued by the justice of the peace on March 8, 1939, charged the defendant with the same offense, and in practically the same words as used in the information, but alleged that the offense was committed on April 8, 1937. So there was a variance as to the date on which the offense was alleged to have been committed, in that the information charged that it was committed on January 31, 1937, whereas the affidavit and warrant charged that it was committed on April 8, 1937, which, if the date of the commission of the offense was correctly alleged in the affidavit and warrant, showed that the prosecution was begun within the two year period. . . .

* * *

The transcript which was filed here last March and which is referred to in the respondent's return shows that, over defendant's objection, the state offered and the trial court admitted, evidence to prove that the prosecution for the offense charged in the information was begun on March 8, 1939, on affidavit and warrant, which warrant was on same date placed in the hands of a constable, charging the defendant with the commission of grand larceny on April 8, 1937, thus showing that the prosecution was begun within the two-year limitation. . . .

My conclusion from the pronouncements of the supreme court of Florida in the above-cited cases is that the statute of limitations does not bar the prosecution of a defendant for a non-capital offense under an indictment returned or an information filed more than two years after the commission of the offense if, prior to the expir-

ation of such two years, an affidavit charging the defendant with such offense has been made before the proper committing magistrate and a warrant issued by him on the basis of such affidavit and placed in the hands of an officer authorized to serve the same. However, as indicated in the above-quoted pronouncements of the supreme court in the Rouse opinion, the indictment or information should in such a situation contain allegations showing that it is based upon the proceedings before the magistrate.

061-39—February 27, 1961

EDUCATION

BOARD OF CONTROL—OPERATION OF AIRPORT AT BOCA RATON—§§240.04, 240.05, F. S.

To: *Dr. J. B. Culpepper, Executive Director, Board of Control, Tallahassee*

QUESTION:

Does the state board of control have legal authority to operate the public airport on the 203 acre tract in Boca Raton held by the state board of education?

The city of Boca Raton has conveyed to the state two tracts of land which formerly composed the Boca Raton air force base. The city acquired the land from the federal government after the base was abandoned following world war II.

One tract approximating 1000 acres was conveyed for the purpose of constructing and operating a state university. The state legislature has authorized a new state university on the site and has appropriated funds for planning the university.

The 203 acre strip adjoining the 1000 acre tract was conveyed to the state separately with the stipulation that it must be maintained as a public airport. It was accepted by the board of control and board of education subject to this condition on the theory that the operation of an airport in connection with the proposed new state university could not only benefit the public in general but would also provide an opportunity for aviation training at the university and that control of the airport adjacent to the campus by the board of control would protect the university from the possibility of undesirable types of business being located on the airport.

The state board of control was created by Ch. 240, F. S. It has jurisdiction over and complete management of all institutions of higher learning in Florida, subject only to the supervision of the state board of education. The state board of education holds title to all lands used for university purposes.

Under §240.04, F. S., the board of control has, among other things:

... full power and authority to make all rules and regulations necessary for their governance, not inconsistent with the general rules and regulations made or which may be made at any joint meeting of the said board with the state board of education; to appoint all the managers, faculty, teachers, servants, and employees, and to remove the same as in their judgment and discretion may be best; fix their compensation and provide for their payment; to have full management, possession and control of each and every of the said institutions and every department thereof,

and the lands, buildings, structures and property belonging thereto; to provide for the course of instruction and the different branches and grades to be kept and maintained thereat, and to alter and change the same; to visit and inspect the said institutions and each and every department, and to provide for the proper keeping of accounts, registers and records thereof; to make and prepare all necessary budgets of expenditures for the enlargement, proper furnishing, maintenance, support and conduct of the same; to audit and approve all the accounts and expenditures, supervise the employment and removal of all teachers and instructors; select and purchase all property, furniture, fixtures, and paraphernalia necessary for the same, from time to time; to build, construct, change, enlarge, repair and maintain any and all the buildings or structures now in existence, or that may hereafter be necessary for each and every one of said institutions created and maintained by law; to purchase and acquire all lands and property necessary for same of every nature and description whatsoever; to care for and maintain the same, and to do and perform every other matter or thing requisite to the proper management, maintenance, support and control of each and every of the said institutions necessary or requisite to carry out fully the purposes of this chapter; and for raising to, and maintaining them at, the proper efficiency and standard as required in and by the provisions of law, but at all times subject to the supervision and control of the state board of education. (Emphasis supplied.)

Section 240.05, F. S., provides:

Extension work authorized.—The state board of control shall extend the outside work of the educational institutions under its direction into all fields of human endeavor which, in its judgment, will best accomplish the objects expressed in §§240.05-240.08.

If the board of control reasonably determines that it can utilize the land in an educational program which would provide college training in aviation, which might include, for example, flight instruction, use and training in air control science incidental to the operation of a public airport, then I am of the opinion the answer to your question would be in the affirmative. In other words, it depends upon whether the board can coordinate a public airport facility into a legitimate college training program.

061-40—March 10, 1961

COUNTY FINANCES

SHERIFF'S OFFICE BUDGET—EFFECT OF OBLIGATIONS IN EXCESS OF—LIABILITY—§§30.48-30.50; CH. 129, F. S.

To: Bryan Willis, State Auditor, Tallahassee

QUESTION:

Where a sheriff, operating upon an office budget adopted pursuant to §§30.49, et seq., F.S., incurs obligations in excess of that budget, who is responsible for the payment of such obligations?

Section 30.48, F. S., places sheriffs in this state on a salary,

instead of being paid from fees collected, and §§30.49, et seq., F. S., place sheriffs' offices on an official budget, which is subject to approval by the board of county commissioners and by the county budget board in counties having budget boards. "The items placed in the budget of the board of county commissioners pursuant to this law shall be subject to the same provisions of law as the county budget" (§30.49(6), F. S.), such county budgets being regulated by Ch. 129, F. S. When a county annual budget is made, approved and becomes final, "it is unlawful for the board of county commissioners to expend or contract for the expenditure in any fiscal year more than the amount budgeted for each item in such fund . . . and in no case shall the total appropriations of any budget be exceeded . . . and any indebtedness contracted for any purpose against either of the funds enumerated in (the county budget law) . . . shall be null and void, and no suit or suits shall be prosecuted in any court in this state for the collection of the same, and the members of the board of county commissioners voting for and contracting for such amounts and the bonds of such members of said boards also shall be liable for the excess indebtedness so contracted for.

"The sheriff shall requisition and the county commissioner shall pay him, at the first meeting in October of each year, and each month thereafter, one-twelfth of the total amount budgeted for the office Provided further that any part of the amount budgeted for equipment shall be paid at any time during the year upon the request of the sheriff." The payments made to the sheriff, by the county commissioners as aforesaid, shall be paid into his official bank account and he shall "draw his own checks thereon in payment of the salaries of himself and his deputies, clerks and employees and the expenses of his office The sheriff shall keep necessary budget accounts and records, and shall charge all paid bills and payrolls to the proper budget account. The reserves for contingencies, or any part thereof, may be transferred to any of the budget appropriations, in the discretion of the sheriff All expenses incurred in the fiscal year for which the budget is made shall be vouchered and charged to the budget for that year, and to carry out this purpose the books may be held open for thirty days after the end of the year." Unexpended balances at the end of the fiscal year revert to the county fund from which appropriated (§30.50, F. S.).

Under the provision in §30.49(6), F. S., the items placed in the sheriff's office budget under §§30.48, et seq., F. S., become a spending budget to the same extent as the county budget under Ch. 129, F. S. Chapter 129, F. S., which has been adopted by reference in §30.49(6), F. S., for the regulation of sheriffs' budgets under §§30.48, et seq., F. S., establishes a budget system for the control of certain fiscal requirements in connection with such county and sheriffs' offices in Florida. Budgets adopted under these provisions of law are binding on the county commissioners and the sheriffs. They have a force and effect like and similar to the biennial legislative appropriations for the operation of the state, and the estimates of expenditures have the effect of fixed appropriations. The sheriff's budget, under §§30.48, et seq., F. S., except as to capital expenditures, is divided into monthly appropriations (§30.50, F. S.), which are limitations upon the expenditures of a sheriff for such month, except as to unused balances accumulated during previous months of the fiscal year. The sheriff is without authority

to make expenditures in excess of the said appropriations. Funds appropriated for future months may not be anticipated and obligated in advance. Unless there is an appropriation there may be no legal expenditure of public funds (see 42 Am. Jur. 744, et seq., §42). The power of the sheriff to make expenditures from office funds is limited by his office budget and the above mentioned statutes. The obligation of the sheriff's office, as a public agency, is limited by the office budget and expenditures may not be made therefrom unless provided for in the office budget, and then only to the extent and as authorized.

Where a sheriff, operating under an office budget adopted pursuant to §§30.49, et seq., F. S., incurs obligations in excess of that budget, payment thereof from public funds may not be made, in the absence of an amendment legally made authorizing the payment of such expenditure. Attempted expenditures made in violation of the sheriff's office budget are null and void and the sheriff, making expenditures in violation of such an office budget, and his bondsmen, are liable for such illegal expenditures, as well as for any indebtedness contracted for in violation of the office budget.

061-41—March 13, 1961

PERSONNEL—COUNTY SCHOOL SYSTEM
CONTINUING CONTRACTS—EFFECT OF EMPLOYMENT BY
STATE DEPARTMENT OF EDUCATION—§§236.02(6) (b)
AND 238.01(4), F. S.

To: *Thomas D. Bailey, State Superintendent of Public Instruction,
Tallahassee*

STATEMENT OF FACTS:

A properly certificated teacher taught in a Florida county for several years and was awarded a continuing contract. During the school years 1955-56 and 1956-57 this teacher was employed by the state department of education in Tallahassee. At the conclusion of the two years of service with the state department of education the teacher returned to the original county and resumed teaching under continuing contract.

QUESTION:

Based on the above statement of facts, would the two years of service as an employee of the state department of education interrupt the continuity of service of this teacher within the meaning of §236.02 (6) (b), F.S., if

1. The teacher voluntarily terminated his teaching contract?

2. The teacher obtained leave of absence in order to work with the state department of education?

3. The teacher remained on the county payroll and the county was reimbursed by the state department of education for his services?

Section 236.02(6) (b), F. S., provides:

Additional yearly increments to each such member under continuing contract, in recognition of experience and professional growth, assuring a minimum annual salary of five thousand dollars, commencing with the eleventh year of efficient teaching service in the public school sys-

tem of this state, and including the services as set forth in §238.01(4) such service to be continuous except for leave duly authorized and granted provided that service as a teacher as defined in §238.01(4) shall be construed as a part of continuous service where the continuity of educational service is uninterrupted;

Section 238.01(4), F. S., provides, in part:

"Teacher" shall mean any member of the teaching or professional staff and any certified employee of any public free school, . . . and any member and any certified employee of the state department of education. . . .

As defined in the above quoted §238.01(4), F. S., "teacher" includes ". . . any certified employee of the state department of education."

Section 236.02(6) (b), F. S., above quoted includes "the services as set forth in §238.01(4), F. S."

Since under the facts set forth in your letter there has been no interruption in the continuous teaching services (as defined by the legislature) all three of your questions are answered in the negative.

061-42—March 13, 1961

PERSONNEL—COUNTY SCHOOL SYSTEM

ILLNESS-IN-LINE-OF-DUTY LEAVE—INSURANCE BY COUNTY BOARD AGAINST EXCESSIVE PAYMENTS— §231.41, F. S.

To: Thomas D. Bailey, State Superintendent of Public Instruction,
Tallahassee

QUESTION:

In view of the proviso contained at the end of §231.41(1), F.S., could this statute be interpreted to mean that a board of public instruction of any county must mandatorily authorize leave for a total not to exceed 10 days for the causes set forth in the statute and if the board decided to protect itself by insurance, it could do so?

Section 231.41(1) provides:

Illness-in-line-of-duty leave.—Any member of the instructional staff shall be entitled to illness-in-line-of-duty leave when he has to be absent from his duties because of a *personal injury* received in the discharge of duty or because of illness from any contagious or infectious disease contracted in school work. The following requirements shall be observed:

(1) DURATION OF LEAVE AND COMPENSATION.—Leave of any such member of the instructional staff shall be authorized for a total of not to exceed 10 school days during any school year for illness contracted from such causes as prescribed above; provided that county boards shall be authorized, when in the opinion of the county board it is desirable to do so, to carry insurance to safeguard the county board against excessive payments during any year. (Emphasis supplied.)

The statute above quoted is clear. It means that a teacher under the conditions set forth in the statute is entitled to illness-in-line-of-duty leave not to exceed 10 school days during any school

year. Granting of such leave is a mandatory duty of the county school board.

The reference in the latter part of the act to authority of the board to "carry insurance to safeguard the county board against excessive payments during any year" is discretionary with the board.

061-43—March 13, 1961

INSURANCE

FOREIGN INSURER—TAX CREDITS FOR REGIONAL HOME OFFICE CONSTRUCTED ON LEASED LAND—§§624.0312, 624.0307, 624.0308, F. S., §12, ART. IX, STATE CONST.

To: J. Edwin Larson, State Insurance Commissioner, Tallahassee

QUESTION:

Is a foreign insurer, maintaining a regional home office as described in §624.0312 (2), F.S., in a building constructed by said insurer on land leased for that purpose, entitled to the credits and deductions against taxes imposed by §§624.0307 and 624.0308, as provided by §624.0312, F.S.?

Under the provisions of §624.0312, F. S., a foreign insurer *which owns and substantially occupies any building in this state as a regional home office* is entitled to certain credits and deductions against taxes imposed by §§624.0307 and 624.0308, F. S.; viz., premium taxes and taxes on wet marine and transportation insurance. Thus, the answer to your inquiry turns on whether, as a matter of law, a foreign insurer may own a building separate from the leased ground on which it is constructed.

Section 624.0312 has, as its legislative history, Ch. 27989, 1953. Prior to the 1959 revision of the Florida insurance code it appeared as §205.432, F. S. Although the title to Ch. 27989, 1953, fails to indicate the intent of the legislature in the enactment of said chapter, consideration of its provisions leads but to the conclusion that it was intended to bring about economic development in this state by affording foreign insurers certain tax benefits thereby inducing them to locate regional home offices in this state.

A constitutional provision, §12, Art. IX, State Const., added at the general election in 1930, also provided certain tax benefits for a similar purpose. The cases construing said constitutional provision indicate that the supreme court would not employ strict construction used in criminal law but would employ construction which would carry out the real intention of people in making the amendment. (*City of Tampa v. Tampa Ship Bldg. and Eng. Co.*, 136 Fla. 216, 176 So. 411).

Thus, it would appear that §624.0312 should receive a construction which would make its intended purpose operative.

While the question as to whether a building may be owned by a lessee, separate and apart from the ownership interest of the lessor in the ground on which it stands, does not appear to have been resolved by the Florida courts—it is to be noted that the Florida supreme court has recognized the relationship between lessor and lessee as being established by contract or agreement (*Butler v. Maney* (1941), 146 Fla. 33, 36, 200 So. 226, 228) and has also defined a lease as "a conveyance by the owner of an estate to another of a portion of his interest therein for a term less than his own and which passes a present interest in the land for a period specified . . ." (*DeVore v. Lee* (1947), 158 Fla. 608, 30 So. 2d 924).

It has also been stated that for all practical purposes the estate of the lessee amounts to absolute ownership (*Rogers v. Martin* (1924), 87 Fla. 204, 99 So. 551; *Gray v. Callahan* (1940), 143 Fla. 673, 197 So. 396; *Baker v. Clifford-Mathew Inv. Co.* (1930), 99 Fla. 1229, 128 So. 827). Such ownership is, of course, subject to the terms of the lease (*Ireweiss Holding Corp. v. Glenn* (1956), 2 Misc. 2d 804, 153 N.Y.S. 2d 281).

In *Jane H. Cameron v. Oakland County Gas and Oil Co., et al.* (1936), 277 Mich. 442, 269 N.W. 227, 107 A.L.R. 1142, Ann. 1153, a gasoline station erected by a tenant on leased premises for the purpose of operating an oil and gas station was determined to be a trade fixture and regarded as personalty rather than real property and was subject to removal by the lessee within a reasonable time after the expiration of the lease although the lease contained no provision in that regard. See also *N. Gust Hartberg, Respt. v. American Founders' Securities Co., Oscar E. Schwemer, Receiver, Respt., Walter Wisconsin Co., Intervener, Appt.* (1933), 212 Wis. 104, 249 N.W. 48, 91 A.L.R. 536, Ann 539.

The lessee's right to remove trade fixtures has been further recognized in *George F. Grote, Admr. v. Frank Ellis Brown, et al.*, 170 F. 2d 747, 6 A.L.R. 2d 318.

In *Peiser v. Mettler*, (1958), 50 Cal. 2d 594, 328 P. 2d 953, 74 A.L.R. 2d 1, the California supreme court in an action by a landlord against the original tenant, assignees of the lease, and sublessees based upon an alleged breach of the provision of the lease that upon its termination improvements of a substantial or permanent character that may be attached to the land, shall revert to and become the absolute property of the lessor, the court held the defense that the cause of action was for conversion and replevin of real property to be without merit saying that a severance of the fixtures and improvements from the land "changed the character of the property from real to personal, irrespective of the means by which it was accomplished." The permanency of attachment of the fixtures in that case is indicated by the fact that the fixtures involved were deep well irrigation facilities, pumps and water transmission lines.

In *First National Bank of Kansas City v. Dan M. Nee* (1951), U.S. Court of Appeal, 8th Cir., 190 F. 2d 61, 40 A.L.R. 2d 423, the court in considering a lessor's claim for refund of federal income taxes based upon a deduction from gross income of the depreciation of the value of an asserted interest in a building erected by the tenant under a long-term lease where it appeared that the lease had 94 years to run as compared with the remaining useful life of the building of 45 years, and that it was not contemplated that the building erected by the tenant should necessarily remain on the premises throughout the term of the lease, *although the lease provided for ownership by the lessor of building remaining on the land at its termination*, dismissed the action.

In the annotation to that case, text 471, it is pointed out that the lessor has no right to deduct depreciation on buildings or improvements erected by a lessee, whether, under the lease, title to the building passes at once to the lessor or the building will become the property of the lessor upon forfeiture or termination of the lease. Although the problem discussed is one of taxation under the internal revenue code, it nevertheless gives recognition to the proposition that as to buildings erected by the lessee, the terms of the

lease agreement are controlling. (See also Thompson On Real Property, Vol. I, §178.)

In the case of *Hood v. Whitewell*, 120 N.Y.S. 372, affirmed, 93 N.E. 1122, the N.Y. court stated on p. 375, "... The title and ownership of permanent erections generally follow the title of the land, but it is perfectly competent for parties by contract so to regulate the respective interest that one may be the owner of the buildings and another of the lands"

Likewise, in the case of *City of East Orange v. Joshua Hendy Iron Works*, 43 A. 2d 838, the N.J. court of tax appeals stated on p. 384, "... It is possible for title to land to be in one person and title to the building to be in another. ..."

In the case of *Stiles v. Gordon Land Co.*, 44 So. 2d 417, the supreme court of Florida held that a building may be owned by other than the owner of the land on which it is situated when it is intended that such building be removed from the land.

In view of the above opinions and holdings set forth in the above annotations, it is my opinion that a foreign insurer which constructs a building on ground leased for that purpose and maintains therein a regional home office within the purview of §624.0312(2), would be entitled to some of the tax credits and deductions authorized by §624.0312, F. S. Although the above authorities clearly indicate that as to the parties to a lease of land, buildings constructed on such land by the lessee may, by contract, be separated from the land for certain purposes, there is serious doubt that the Florida statutes relating to county and municipal ad valorem taxation of real property and improvements thereon would admit of a construction which would give recognition to a lessee's contract obligation to pay real estate taxes levied and assessed against the lessor landowner.

Thus, it would appear that a foreign insurer under the proper circumstances, which could only be determined upon analysis of the facts and contractual provisions of each transaction, could qualify for the credits and deductions against the Florida premium tax as appear in §624.0312(1)(a). Where a regional home office is maintained by a foreign insurer and constructed on leased ground, it does not appear that the credits and deductions against the premium tax authorized by §624.0312(1)(b), F. S., viz., an amount equal to the full amount of all ad valorem taxes paid by such a foreign insurer during the year next preceding filing of the premium tax return, which were levied and assessed against the real property on which the building was constructed, could be recognized.

These comments appear to answer the question in a general way and do not reflect determination of a particular set of facts and circumstances surrounding a particular transaction.

061-44—March 14, 1961

RECORDS

COUNTY TAX ROLLS FILED WITH CLERK OF CIRCUIT COURT—MICROFILMING AND SUBSEQUENT DESTRUCTION—§§193.30, 119.04, 18.20, 944.53, 696.05, 92.35, F. S.

To: *Tom Adams, Secretary of State and Chairman Public Records Screening Board, Tallahassee*

QUESTION:

May assessment rolls used in prior years by tax col-

lectors in collection of taxes on file in the office of the clerk of the circuit court be microfilmed and subsequently destroyed?

Section 193.30, F. S., provides, among other things, as follows:

Clerks of the circuit court are hereby authorized to destroy duplicate copies of assessment rolls now on file in their offices, retaining, however, assessment rolls used in prior years in collection of taxes.

The legislative history of said section indicates it last received the attention of the legislature in 1949. Ch. 57-66, which now appears as §119.04, F. S., authorized the destruction of public records with the approval of the public records screening board. Said section also authorizes the photographing of such records prior to their destruction and provides that §92.35, F. S., relating to admissibility of evidence is applicable to public records photographed pursuant to §119.04.

Chapter 59-429 (§696.05, F. S.) authorized the use of the microfilm process for original recording of any and all instruments filed for record.

In addition, §18.20, F. S., authorizes the state treasurer to preserve certain public records of his office by the microfilm process. The division of corrections, by §944.53, F. S., is authorized to preserve certain of its records by the microfilm process. It has also become the practice of the state comptroller's office to microfilm and subsequently destroy state warrants (§696.05, F. S.).

In view of the above statutory provisions, and it being a matter of common knowledge that the use of the microfilm process for the preservation of public records results in a great saving of much needed storage space, it is my opinion that the public records screening board is empowered to authorize the several clerks of the circuit court to microfilm tax assessment rolls for prior years now filed with said clerks and subsequent to such microfilming, authorize the destruction of such assessment rolls. It should be pointed out that if the microfilm process is to be used for this process, it should be determined that suitable viewing equipment is readily available for the examination of the microfilmed assessment rolls prior to their destruction.

061-45—March 14, 1961

COUNTY FINANCES
PREMIUMS FOR INSURANCE ON SHERIFF'S DEPUTIES
AND EMPLOYEES NOT AUTHORIZED AS OFFICE
EXPENSE—§§112.08 112.14, F. S.

To: *Bryan Willis, State Auditor, Tallahassee*

QUESTION:

May a sheriff pay from his official funds all or part of the cost of life, health, accident, hospitalization, or annuity insurance for his deputies, employees, or himself?

It is assumed for the purpose of this writing that the policies of insurance referred to are group coverage.

Sections 112.08 through 112.14, F. S., authorize group policies of life, health, accident, hospitalization, or annuity insurance on a payroll-deduction, voluntary premium-payment plan. There appears to be no authority for the use of public funds, viz., official funds of a sheriff in payment of any portion of such premiums. This is in keeping with the fundamental proposition that public

moneys shall not be used for private benefit. (See AGO 055-100, May 11, 1955, p. 131 of the 1955-56 Biennial Report of the Attorney General.)

061-46—March 14, 1961

TAXATION

DOCUMENTARY STAMP TAXES—DEEDS FROM MORTGAGEES TO FEDERAL AGENCIES IN CONNECTION WITH INSURED LOANS NOT SUBJECT TO—§201.02, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Are conveyances from national banks to the federal housing commissioner and the veterans administration, in connection with federal mortgage insurance, subject to Florida documentary stamp taxes?

Sections 1707, et seq., title 12, of the U. S. code, established a mutual mortgage insurance fund for the purpose of insuring the payment of mortgages as therein provided, including such insurance by the federal housing commissioner as provided in and by §1709 of said title 12, as well as other sections of the said code. The said commissioner is authorized, by §1713, title 12, of the U. S. code, to "acquire possession of and title to any property, covered by a mortgage insured under this section and assigned to him, by voluntary conveyance in extinguishment of the mortgage indebtedness," or may himself institute foreclosure proceedings. Other sections contain similar provisions. It, therefore, appears that where an institution or agency holding a mortgage insured under and pursuant to §§1707, et seq., title 12, of the U. S. code, forecloses the insured mortgage and takes title to the same, the federal agency insuring the loan may, upon paying the amount covered by the said insurance, obtain title from the mortgagee holding and foreclosing the said mortgage. Proceedings in connection with veterans administration guaranteed loans are substantially the same as above mentioned (§§1801, et seq., title 38, U. S. code).

The above question involves conveyances from national banks to federal agencies acting for the federal government. As a general rule a state has no power to subject a national bank, or its property, to taxation, directly or indirectly, except in so far as is permitted by an act of congress, and then the power must be exercised in strict conformity with the permission given and with the terms and restrictions attached thereto (84 C. J. S. 293, et seq., §150; 51 Am. Jur. 309, et seq., §254), such banking institutions being deemed to be instrumentalities of the U. S. The federal housing commissioner and the veterans administration are likewise instrumentalities of the U. S., subject to the same rule.

"As a general rule a state may not impose a license or privilege tax on the activities of the federal government or on the business of any of its agencies or instrumentalities, except where the United States has consented to such tax." (53 C. J. S. 469 and 470, §6). This rule has been held "to prevent the imposition of a state license, privilege, occupation, sales, use or other excise tax on a national bank, a federal land bank, . . ." (53 C. J. S. 557, §29). Documentary stamp taxes are usually deemed to be excise taxes levied with respect to the creation of instruments (84 C. J. S. 248, §124). In *Plymouth Citrus Growers Ass'n v. Lee*, 157 Fla. 893, 27 So. 2d 415,

the tax imposed by Ch. 201, F. S., was said to be an excise tax on the promise to pay. Documentary stamp taxes imposed on deeds of conveyance by §201.02, F. S., appear to be an excise tax.

In the light of these authorities, the above stated question is answered in the negative.

061-47—March 14, 1961

FLORIDA HIGHWAY CODE

ROAD DEPARTMENT CONTRACT FOR FOUR-LANING MICHIGAN AVENUE, ORLANDO—CONSTRUCTION OF §337.11(4), F.S., AND APPLICABLE SECTIONS STATE ROAD DEPARTMENT MANUAL

To: *Thomas T. Cobb, General Counsel, State Road Department, Daytona Beach*

QUESTIONS:

1. What do the words "exceeding the original limits of the contract" in §337.11(4), F.S., mean? Does this refer to dollars or to footage?

2. What bearing does the competitive bidding statute have on this situation?

3. Does the fact that Michigan avenue, at the time the work was done, was neither a portion of the state primary system nor of the state secondary system have any bearing on the question?

4. What is the difference between a "supplemental agreement" and a "change order"?

5. What is your view with regard to the advisability of an action to recover for the state the cost of the Michigan avenue project?

6. If such an action should be instituted, what would the venue be?

7. Would the failure of the members of the road board to vote on this matter affect the chances for a recovery by the state?

AS TO QUESTION 1:

Section 337.11(4), F. S., reads as follows:

Whenever a contract is awarded to the lowest responsible bidder, no supplemental agreement *exceeding the original limits of the contract* shall be executed, and any such supplemental agreement in violation of this section shall be null and void, and no money shall be paid thereon. Any such violation of this section shall become a liability against the bond of any board member voting to approve such supplemental agreement. (Emphasis supplied.)

The use of the words "the original limits of the contract" appears to me to relate only to the physical limits and not to the amount of the contract. Had the legislature intended to relate the same to the amount it could have so stated. An examination of the road department manual indicates that this is the administrative interpretation of the statute which was enacted as a part of the highway code by the 1955 legislature.

AS TO QUESTION 2:

Section 4.3 of the road department manual provides in part as follows: "No alterations shall be made which will result in a substantial change in the general plan or character of the work

so as to evade the competitive bidding statute. "This rule specifies that alterations shall not be made for the purpose of evading the competitive bidding statute. The public is guaranteed an adequate road system and full value for the moneys expended on public roads by requirements such as advertisement for sealed bids, detailed plans and specifications, and awarding the work to the lowest and best bidder. This entire framework falls where the plans and specifications are not adhered to in the strictest detail. In answer to your question, therefore, the competitive bidding statute is the very heart of the problem.

AS TO QUESTION 3:

The fact that the work was done on a street which was neither a portion of a state primary or a secondary road system further confirms my view that the same was not a proper subject for the expenditure of state funds. Although the change order relates that the basis for same was "to provide a suitable connection for the heavily travelled Michigan avenue with the project now under construction" I am advised that road department records fail to reveal that a travel check was made to determine the authenticity of this statement.

AS TO QUESTION 4:

A change order and supplemental agreement have been defined in §§1.8 and 1.37 of the road department manual as follows:

1.8 *Change order.* A written order to the contractor, signed by the engineer, covering changes in the plans when the items of work affected are covered by the contract and when the amount of the work changed is not sufficient to require a supplemental agreement. Change orders duly signed and executed by the contractor constitute authorized modifications of the contract.

1.37 *Supplemental agreement.* A written agreement between the contractor and the department, with the consent of the contractor's surety, covering alterations and unforeseen work incidental to the project, and revisions in or amendments to the terms of the contract.

I like the distinction, however, as found in a letter from the road department resident attorney, which is as follows:

There are several major differences in the supplemental agreement and the change order. First, the change order does not require board action nor execution by the executive director or the chairman. A supplemental agreement does require both execution by the executive director and approval by the board; and, secondly, a change order is a minor modification within a limited area of engineering discretion for the necessary successful construction of the job. This discretion is not limited to an absolute necessity for the change, but if it is reasonably needed *and is not a major deviation from the original construction*, it is allowed. A supplemental agreement, on the other hand, contemplates a major deviation from the original contract to the extent that the character of the work is materially changed or the cost thereof increased.

The change order has a definite place in construction contracts. Its use, however, is restricted to the completion of the original contract and overcoming obstacles unforeseen by the parties at the time of the original execution of the contract. It is not for the purpose of, nor should it be used to encompass new and

additional work which may be needed and necessary but which was not in the minds of the parties at the time of the original agreement.

I am sure you are familiar with §334.08(2), F. S., which requires the posting of a bond by each road board member conditioned "upon the faithful performance of his duties." The administrative determination of whether the board's action or failure to act constitutes a violation of this condition may be made by the chief executive. In the absence of statute a suit on a bond can be maintained only by the obligee named therein. Where the statute directs that a bond shall be given to a certain officer, or to him and his successors, the bond may be put in suit by his successors. Thus a bond to the governor and his successors may be sued upon by the latter (9 C. J. Bonds §152, 11 C.J.S. Bonds §106, 49 Am. Jur. §§81 and 43 Am. Jur. §440). No doubt the governor will consider all the pertinent facts and determine whether an improper or corrupt motive was involved and the degree to which the public interest has been disregarded. This office has long adhered to the policy of not interfering with the duly constituted duties of other administrative officers of the executive branch of the government.

AS TO QUESTION 6:

Venue would appear to lie in Orange county.

I do not believe that the failure of members of the board to vote on this matter in a formal meeting would affect their liability. Certainly a public official could not evade liability due to his omission to act where he is charged with the responsibility to act.

It is my opinion that the pertinent statutes and regulations would not be judicially construed to authorize the area engineer and the chief engineer of the state road department to extend the original physical limits of a highway contract. The necessity for the extension should have been anticipated at the time of the letting of the original contract so as to permit competitive bidding and bring to bear all the other protections surrounding the original letting of a contract, or another contract should have been awarded for the extension pursuant to competitive bidding.

In answering the above questions, I have carefully examined the road codes of 1959, 1957, 1954 and 1950, and these generally reflect the requirements of the Florida highway code (Chs. 334, 335, 336, 337, 338 and 339, F. S.). I am unable to find, however, where the restrictions as found in §337.11(4) were ever made a part of the state road manual. An examination of the code and the state road manual clearly shows that the Michigan avenue extension of the project would not be the proper subject of a change order even in the absence of the above quoted direct statutory prohibition.

Section 337.11(4), F. S. (Ch. 29965, 1955) was enacted in 1955 for the specific purpose of precluding an extension of the original physical limits of a project embraced in a highway contract. the key word in the statute is the word "exceeding." As used it means the physical limits of the project shall not be added to or extended. If extensions of the character as involved in the Michigan avenue project were allowed by change orders when they cannot be "exceeded" by supplemental agreement then the statute is meaningless and serves no useful purpose.

061-48—March 22, 1961

**COUNTY SCHOOL OFFICERS
SUPERINTENDENT OF PUBLIC INSTRUCTION—ELIGIBILITY
TO SERVE AS JUVENILE COURT COUNSELOR—§15,
ART. XVI, §12, ART. V, §6, ART. VIII, STATE CONST.;
§228.041(12), F. S.**

To: *Alfred T. Airth, Attorney at Law, Live Oak*

QUESTION:

May superintendents of public instruction be appointed and serve as juvenile court counselors?

Under §15, Art. XVI, State Const., "no person shall hold, or perform the functions of, more than one office under the government of this state at the same time; provided, notaries public, militia officers, county school officers and commissioners of deeds may be elected or appointed to fill any legislative, executive or judicial office." Section 12, Art. V, State Const., makes provision of juvenile courts and their officers, providing in part that the legislature may provide "for the qualification, election or selection and appointment of judges, probation officers and such other officers and employees of such courts as the legislature may determine" The powers and duties of juvenile court probation officers (referred to as counselors in the statutes) under the constitution and statutes seem to make them county officers and not employees (State v. Martens, 141 Fla. 666, 193 So. 835). This being true, juvenile court probation officers or counselors are officers within the purview of §15, Art. XVI, State Const.

However, the proviso in §15, Art. XVI, State Const., provides that "county school officers may be elected or appointed to fill any legislative, executive or judicial office." This brings us to the question of whether or not the county superintendent of public instruction is a *county school officer* within the purview of this proviso.

Section 6, Art. VIII, State Const., provides that "the legislature shall provide for the election by the qualified electors, in each county of the following county officers: ... a superintendent of public instruction" This constitutional provision seems to classify the county superintendent of public instruction as a county officer. Under §228.041(12), F. S., the officers of each county school system "shall be the *county superintendent of public instruction* and members of the county board of public instruction." (Emphasis supplied.)

County superintendents of public instruction are county school officers within the purview of the proviso in §15, Art. XVI, State Const.

The above stated question is answered in the affirmative.

061-49—March 22, 1961

**OCCUPATIONAL LICENSE TAXES
CONSTRUCTION OF §205.58, F. S., IN RELATION TO PERSONS
ISSUING EXPRESS MONEY ORDERS AS AGENTS
OF AMERICAN EXPRESS COMPANY—§199.02, F. S.**

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are persons, firms and corporations issuing express

money orders as agent or sub-agent for the American express company, within the purview of §205.58, F.S., and liable for occupational license taxes thereunder?

We gather from three specimen forms of express money orders furnished us that they are in the form of draft drawn by an officer, agent or sub-agent of the American express company to a payee, or his order, upon the said American express company. In substance, these forms when completed and signed are in form a direction by an agent of sub-agent of the American express company, to the said express company, to pay a stated sum to a payee, or his order, there being indicated thereon the name of the sender or person requesting the same. These money orders bear a close resemblance to a bank check or a draft for the payment of money. A postal money order has been defined "as a species of draft drawn by one post office upon another for an amount of money deposited at the first office by the person purchasing the money order" (Black's law dictionary). A money order has been said to be an order for the payment of money (Webster's dictionary). "A draft is a written order by one person on another to pay a sum of money therein mentioned to a third person on demand or at a future time" (10 C. J. S. 412, §6). The term "check" ordinarily includes drafts (10 C. J. S. 410, §5). Express money orders are drafts drawn on the express company, by some officer, agent or sub-agent of said express company, for the payment of money to a third person, or his order. Such money orders bear some relation to a cashier's check, which has been said to be a bill of exchange drawn by a bank, or its cashier, upon itself or another bank.

We are advised that Western Union is issuing express money orders as agent or sub-agent of the American express company. Under §199.02(1), F. S., cashiers' and certified checks, bills of exchange and drafts are classified as "class 'A' intangible personal property." This raises the question as to when do cashiers' and certified checks, bills of exchange and drafts, as mentioned above, become intangible personal property subject to intangible personal property taxes? Are such documents property in the hands of their issuer prior to delivery, or is a delivery necessary to make them intangible personal property? In short, is the American express company, and its agents and sub-agents, engaged in trading, bartering, buying, lending or selling intangible personal property, when it issues money orders to third persons for a fee? Is the creation of negotiable or non-negotiable instruments a trading, bartering, buying, lending or selling thereof, within the purview of §208.58, F. S., which imposes a license tax "on every person engaged in the business of trading, bartering, buying, lending or selling intangible personal property, whether as owner, agent, broker or otherwise?"

"Every contract on a negotiable instrument is incomplete and revocable until delivery of the instrument for the purpose of giving effect thereto ..." (§674.18, F. S.). "A bill or note is incomplete and revocable until there is a valid delivery" (10 C. J. S. 510, §78; Johnson v. Smith, Fla., 84 So. 2d 723, text 724). The issuance of a negotiable instrument means "the first delivery of the instrument, complete in form, to a person who takes it as holder" (§674.01, F. S.). In *Helvering v. Stein*, CCA 4th, 115 Fed. 2d 468, text 471, the court held that "a promissory undertaking to pay money is not property in the hands of the person who makes the promise or agreement; for obviously, a person has not and cannot have a valid legal claim against himself in the same legal capacity. The

negotiation of such paper creates for the first time a legal claim against the negotiator, so that this transaction is a negotiation and not a sale. After such a negotiation, however, a subsequent transaction of the paper may very well be, and usually is, a sale." To the same effect see also *Schermerhorn v. Talman*, 14 N. Y. 93, text 116; *McLean v. Lafayette Bank*, CC Ohio, 16 Fed. Cas. 264, case no. 8,888; *Bank of Ashland v. Jones*, 16 Ohio St. 145, text 155; *Danville v. Sutherlin*, 20 Gratt. (Va.) 555.

A check has no valid inception until delivery (10 C. J. S. 511, §78, note 32). The mere signing of a note does not amount to an execution thereof so as to bind the maker, delivery of the instrument being required (10 C. J. S. 511, §78, note 32). As a general rule, a negotiable instrument, like any other written instrument, has no legal inception or valid existence until it has been delivered in accordance with the purpose and intention of the parties (7 Am. Jur. 807, §32). A note in the hands of its maker before delivery is not property, nor the subject of ownership, as such (*Salley v. Terrill*, 95 Me. 553, 50 A. 896, 55 L. R. A. 730, 85 Am. St. Rep. 433). Delivery is part of the execution of an instrument (*Palmer v. Poor*, 121 Ind. 135, 22 N. E. 984, 6 L. R. A. 469). See also definitions of the word "issue" in Words and Phrases. Municipal bonds are not issued until duly executed and *delivered* to holders (*State v. Fort Myers*, 143 Fla. 304, 196 So. 705, text 710).

The American express company is the issuer of the money orders mentioned in the above stated question, which documents come into existence when delivered and accepted by the person procuring the same from the express company. The money orders do not become intangible personal property until they have been executed and delivered by or for the express company. The express company is not engaged in the business of trading, bartering, buying, lending or selling intangible personal property; it is engaged in the issuance of drafts or negotiable instruments which become and are intangible personal property upon delivery by the express company, but not until delivery. Had the legislature intended to tax the issuance of intangibles, as well as the trading, bartering, buying, lending and selling the same, they doubtless would have used the term "issuing."

It being our view that §205.58, F. S., imposing a license tax on persons engaged in the business of trading, bartering, buying, lending or selling intangible personal property, does not extend to and include the issuance of such property, the above question is answered in the negative. Any agent or sub-agent of the express company, including the Western Union, issuing such money orders for and in behalf of the express company, is not engaged in trading, bartering, buying, lending or selling intangible personal property, but is engaged in issuing intangible personal property as agent of the express company.

061-50—March 27, 1961

**TRUSTEES INTERNAL IMPROVEMENT FUND—OIL, GAS
AND MINERAL LEASES**

COASTAL PETROLEUM CO.—LEASES NUMBERED 224A,
224B AND 248—EFFECT OF RECENT COURT DECISION
GRANTING LESSEE COASTAL EXPLORATION
RIGHTS FOR OTHER MINERALS UPON SALES
OF SOVEREIGN LAND BY TRUSTEES—CH.
20680, 1941, CH. 8537, 1921, CH. 22824, 1945-
(§§253.51-253.60, 253.61 F. S.) CH. 26776,
1951, CH. 57-362, LAWS OF FLOR-
IDA; §§253.47, 253.12, 253.122,
253.123, 253.0013 (2), F. S.

To: Trustees of the Internal Improvement Fund, Tallahassee
QUESTION:

What is the effect of the decision of the district court of appeal of Florida, 1st Dist., rendered in the case of Collins, et al v. Coastal Petroleum Co., as reported in 118 So. 2d, p. 796, granting lessee, Coastal Petroleum Co., exploratory rights for "other minerals" in certain "oil, gas and sulphur drilling leases," covering certain submerged lands of the state, title to which is now vested in the trustees of the internal improvement fund, which leases granted to the lessee the "right to explore for oil, gas and other minerals" upon sale of submerged lands riparian to upland property within the area covered by these leases?

The chronology of the contractual relationship between the Trustees of the Internal Improvement Fund and Coastal Petroleum Company may be briefly stated as follows:

On October 4, 1941 the Trustees entered into an "exploration contract for oil, gas and minerals and option to lease" agreement with Arnold Oil Explorations, Inc., a Florida corporation, whereby Arnold was granted rights to explore for oil, gas and minerals in the following described lands:

All those water bottoms, overflow or submerged areas, bars, islands, and adjacent waterfront lots contiguous to such areas in classification (a) and (b) hereof, all of the same being lands held and owned by the State of Florida under the administration of said Trustees, more particularly described as follows: Offshore area, all water bottoms of the Gulf of Mexico within three leagues (10.36) statute miles of the ordinary high watermark to the outermost shore extending from the westernmost point of St. George Island to the west to the 26 parallel of Collier County to the south; bays-sounds-bayous. All submerged lands and water bottoms in all bays, sounds and bayous in the Gulf and adjacent government water front lots contiguous to such areas between the western and southern limits above named.

This agreement specifically states that it is entered into under authority granted by Chapter 20680, Laws of Florida, 1941, which is as follows:

"Section 1. That from and after the passage of this Act the Board of Trustees of the Internal Improvement Fund of Florida and the Board of Commissioners of State

Institutions of Florida and the State Board of Education of Florida is each hereby authorized to negotiate, sell and convey lease-hold estates and to make, execute and deliver lease-contracts commonly known as petroleum oil and gas leases to any person, firm, corporation or association authorized to do business in the State of Florida thereby granting such persons all rights usually conveyed by petroleum oil and gas leases as to any lands or water bottoms the legal title to which is vested by law, or otherwise, in such Board or Boards, on such terms and conditions as may be agreed upon between the State Board executing the lease and the Lessee named in the lease.

"Section 2. The several State Boards named in Section 1 of this Act are hereby authorized and empowered to sell and convey any and all of the petroleum oil and/or gas and/or any other mineral of any kind whatsoever lying and being in or under any of the lands or water bottoms in this State, the legal title to which lands and/or water bottoms is vested by law, or otherwise, in such State Board or Boards and to execute good and sufficient royalty deeds conveying such interests in such petroleum oil and/or gas and/or other mineral as may be agreed upon between the State Board executing such royalty deed and the vendee named therein and under such terms and conditions as may be agreed upon between such Board and such vendee. Provided, however, every lease executed by any of such State Boards under the provisions of this Act shall require the lessee or his assignees to drill at least one test well on the lands leased within the first five year period of the lease and to drill at least one additional well in each succeeding five year period until the total number of wells drilled shall equal one-half the number of sections of land embraced in the lease. The lessee at the time the drilling of each well is commenced shall file with the lessor a written declaration describing the two sections of land to which such well shall apply. If no well shall be commenced within the first five year period the entire lease shall be void. If no well be commenced within the second or any subsequent five year period then the lease shall at the end of such five year period become forfeited and void as to all parties as to all lands embraced therein which shall not have been designated by the lessee or his assignee to be applicable to a well theretofore drilled as herein required.

"Section 3. This Act shall take effect upon becoming a law."

Under the terms of the option granted in the original exploratory agreement, the Trustees, on December 27, 1944, granted a "drilling lease" to Arnold Oil Explorations, Inc. The area covered by this lease was a belt along the Gulf coast from the western end of St. George Island to a point opposite Port Richey. This drilling lease was referred to as 224-A and was subsequently modified and re-executed on February 27, 1947 and called 224-A, as modified, with Coastal Petroleum Company executing the same as successor to Arnold Oil Explorations, Inc.

Under the terms of the option granted in the original exploratory agreement the Trustees, on March 27, 1946, granted a "drilling

lease" to Arnold Oil Explorations, Inc. The area covered by this lease was a belt along the Gulf coast beginning on the north at the southern extremity of the area covered by 224-A and extending to the 26th parallel in Collier County on the south. This agreement was referred to as 224-B and was subsequently modified and re-executed on February 27, 1947 and called 224-B, as modified, with Coastal Petroleum Company executing the same as successor to Arnold Oil Explorations, Inc., as lessee.

As provided for in the option in the original agreement an additional drilling lease number 248 was executed with Arnold Oil Explorations, Inc. on December 19, 1944. The area covered by this lease consists of certain inland lakes and rivers and Coastal Petroleum Company is holder of this lease as successor to Arnold Oil Explorations, Inc.

Suit was instituted by Coastal Petroleum Company against the Trustees in the Circuit Court of Leon County, Florida to secure a judicial interpretation of what was meant by use of the term "other minerals and mineral leases" as used in the contracts between the Trustees and Coastal, giving Coastal the right to explore for oil, gas and other minerals. It was the decision of the Court that Coastal was entitled to receive oil, gas and mineral leases and that "minerals" referred to minerals of any kind whatsoever. *Collins, et al. v. Coastal Petroleum Co.*, 118 So. 2d 796. The question to be considered at this time is do these drilling leases grant any rights to Coastal to explore for minerals in sovereign lands owned by the Trustees heretofore sold or to be sold to the upland riparian owners, whether filled or unfilled.

The rights of the Trustees, the lessees, and the purchasers of submerged bottom lands subsequent to the execution of these drilling leases must be determined from the contracts themselves and applicable statutes and laws existing when the contracts and drilling leases were executed, subject to the valid exercise of the police power of the State. The rights of the lessee, Coastal, are subject to the conditions reserved to the State by the agreements, including applicable statutes.

At the time the original "exploration contract" was entered into Chapter 8537, Acts of Florida, 1921, commonly known as the "Butler Act", was in full force and effect. This act divested the State of all right, title and interest to all lands covered by water lying in front of any tract of land owned by the United States or any person, corporation, etc. lying upon any navigable stream or any bay of the sea or harbor as far as the edge of the channel; and vested the title to the same in the riparian proprietors, subject any bay of the sea or harbor as far as the edge of the channel; to the public's inalienable trust, provided that the grant therein made should apply to and affect only those submerged lands which had been or might thereafter be actually bulkheaded, filled in or permanently improved continuously from high watermark in the direction of the channel or as near in the direction of the channel as practicable so as to equitably distribute such submerged lands, but this divestiture was in no wise to affect such submerged lands until they were actually filled in or permanently improved.

In *Holland v. Fort Pierce Financing and Contracting Co.*, 27 So. 2d 76 the Supreme Court of Florida, in discussing the application of this statute, had this to say: "Chapter 8537, acts of 1921, granted the upland owner whose lands were bounded by high watermark with title to the submerged lands to the edge of the channel,

but such title was a qualified one and did not become absolute until the upland owner actually bulkheaded and filled in from the shore to the edge of the channel. Expressed otherwise, such lands were subject to reversion any time before the provisions of the act were exercised."

In *Duval Engineering and Contracting Co. v. Sales*, 77 So. 2d 431 we find the following language: "It is clear that Chapter 8537, Acts of 1921, had no other purpose than to stimulate and encourage improvement of submerged lands and to improve the foreshore in the interest of commerce and navigation."

Whatever authority was granted to the Trustees by Chapter 20680, Acts of 1941 to execute contracts of the nature here being considered must be considered in relation to the limitations placed thereon by Chapter 8537, Acts of 1921, since this statute was in full force and effect at the time these agreements were executed. Chapter 20680, Acts of 1941, which is the stated authority for execution of the original exploratory agreement, was repealed by Chapter 22824, Acts of 1945 (§§ 253.51-253.60 and 253.61, Florida Statutes). Drilling lease 224-B, having been executed on March 27, 1946, comes within the purview of authority granted by Section 253.61, Florida Statutes, which reads as follows:

"253.61 Same; lands not subject to lease.— (1) Regardless of anything to the contrary contained in this law in any previous section or part thereof, no board or agency mentioned therein or the state shall have the power or authority to sell, execute or enter into any lease of the type covered by this law relating to any of the following lands, submerged or unsubmerged, except under the circumstances and conditions as hereinafter set out in this section, to wit:

"(a) No lease of the type covered by this law shall be granted, sold or executed covering such lands within the corporate limits of any municipality *unless the governing authority of the municipality shall have first duly consented to the granting or sale of such lease by resolution.*

"(b) No lease of the type covered by this law shall be granted, sold or executed covering any such lands in the tidal waters of the state, *abutting on or immediately adjacent to the corporate limits of a municipality or within three miles of such corporate limits* extending from the line of mean high tide into such waters, unless the governing authority of the municipality shall have first duly consented to the granting or sale of such lease by resolution.

"(c) No lease of the type covered by this law shall be granted, sold or executed covering such lands on any *improved beach*, located outside of an incorporated town or municipality, or covering such lands in the tidal waters of the state abutting on or immediately adjacent to any improved beach, or within three miles of an improved beach extending from the line of mean high tide into such tidal waters, unless the county commissioners of the county in which such beach is located shall have first duly consented to the granting or sale of such lease by resolution.

"(2) For the purposes of this section and law an

improved beach, situated outside of the corporate limits of any municipality or town, shall be and is hereby defined to be any beach adjacent to or abutting upon the tidal waters of the state and having not less than ten hotels, apartment buildings, residences or other structures, used for residential purposes, on or to any given miles of such beach."

We are firmly convinced it is logical and proper to conclude that any exploratory operations for minerals would be subject to the same limitations and restrictions contained in the agreement and applicable statutes as to location and drilling of wells for gas, oil and sulphur since these rights to explore for "minerals" were, by Court decision and decree in *Collins, et al. v. Coastal Petroleum Company*, supra, determined to have been granted in the same agreement. Section 253.61, Florida Statutes, supra, prohibits the granting of oil and gas leases encumbering State lands within municipal corporate limits or adjacent thereto without the municipality's consent with the same provision affecting improved beaches as therein defined without the consent of the county commissioners of the county affected.

Section 253.47, Florida Statutes, authorized the Trustees to enter into leases to drill wells for petroleum and natural gas provided that such lease *shall not confer upon the person acquiring the same the right to enter upon any private property of another.*

While no mention is made in these sections of the statutes of the subject of exploration for minerals, it is my opinion that since the rights to explore for these minerals were granted in the same oil and gas drilling lease agreement as determined by Court interpretation, I believe the limitations and restrictions contained in the leases and applicable statutes must be applied as well to the exploration activities for minerals as they do for drilling for oil and gas and sulphur since they are treated as items of the same genre, have their inception in the same grant of authority, are packaged in the same documents and appear amenable to the same regulation.

Chapter 8537, Acts of 1921, supra, was repealed as to all counties, except Palm Beach and Dade, by Chapter 26776, Acts of 1951 and it was repealed as to these two counties by Chapter 57-362, Acts of 1957. Chapter 57-362, Acts of 1957, known as the "Bulkhead Act," represented a comprehensive change in the policy of the State as it affected the sale and development of submerged lands riparian to the upland owners. This act fixed the procedure whereby bulkhead lines would be established in the areas authorized and sales of sovereign submerged lands within the bulkhead line so fixed were limited to upland owners riparian to such submerged lands. Moreover, dredging and filling permits are required. The primary purpose of this new police regulation policy was to provide for an orderly and systematic development of the waterfront areas of the State. It was also an indication of the legislative intent that these submerged areas, classified as riparian submerged areas, should not be impressed or saddled with any superior leasehold liabilities which would permit drilling for oil, gas and sulphur or exploration for minerals, except as might be consented to or authorized by local units and the Trustees of the Internal Improvement Fund pursuant to the applicable provisions of the "bulkhead act."

In addition to the restrictions which have been heretofore set

forth, it is my firm conviction that these riparian submerged lands or areas heretofore sold by the Trustees or to be sold to upland owners, whether filled or unfilled, are impressed with an inviolate trust which is not subject to being interfered with by a lessee under the terms of an agreement with the Trustees granting said lessee certain rights to drill and explore for oil, gas and sulphur and which the Court subsequently determined to include "other minerals," without the consent of the owners of such areas involved. In the case of *Collins, et al. v. Coastal, supra*, the Court declared that "other minerals" included minerals of any kind whatsoever and gave lessees the right to explore for these minerals. However, this paragraph in the opinion of the court is significant: "It is urged that the Court should declare the leases of the plaintiff invalid because it is contended adequate protection is not afforded the public in the regulation of the methods which may be employed in producing heavy minerals. This is a question of policy vested by the statutes in the Trustees."

I am therefore proceeding upon the assumption that the riparian areas heretofore described do need adequate protection in view of the methods of exploration which are commonly employed in exploring for heavy minerals. These may involve dredging, drag-line operations, pit mining, hydraulic pumping, moving of beach sands, etc. It is my unalterable position that the exploratory rights granted to Coastal in the first instance, and those which the Court subsequently determined were theirs, do not apply to nor include the submerged lands riparian to upland ownership as defined in Chapter 8537, Acts of 1921, and 57-362, Acts of 1957, whether filled subsequent to purchase or still submerged, and whether in private ownership or owned by the Trustees, absent consent or permission lawfully obtained pursuant to applicable law, including the "bulkhead act."

In Opinion of the Attorney General No. 058-3, dated January 3, 1958, in response to a question as to whether a Board of County Commissioners, under and by virtue of authority granted in Section 253.122, Florida Statutes, can establish bulkhead lines over lands in private ownership which were acquired prior to the effective date of said section of the Florida Statutes, we find the following: "It therefore seems, with the exception of said situation described in Sections 253.123 and 253.0013 (2), and the last paragraph of Section 253.12, F.S., which are outlined above, bulkhead lines can be established across any lands in said navigable waters of the state, including those conveyed prior to the effective date of the Act. The fixing of a bulkhead across private property, although it may limit the use of the property, does not divest the owner of his title absolutely; however, it does restrict its private use for the benefit of the general public. We do not construe the Act to mean that only lands, title to which was vested in the Trustees pursuant to law (that is either by the 1951 Act or earlier acts or in the bulkhead act itself), are subject to having bulkhead lines thereon. The intent of the act is to provide bulkhead lines or recognize bulkhead lines previously established, to accomplish a public purpose under the police power. Title may have been vested in private persons prior to the Act, but this does not take away the power of the Legislature to regulate in the manner provided by the bulkhead act unless it can be shown that a constitutional right is violated in a particular case. No rights, however, are absolute." We are firmly convinced that the police regulations contained in the "Bulkhead Act" designed

to protect public and private rights and the welfare of communities adjacent to areas covered by Coastal leases apply with equal force to the Coastal lease rights as we have held these regulations to apply to titles previously granted in fee to private parties in submerged areas.

This opinion is further substantiation of my conclusion that it was never the legislative intent to authorize the execution of oil, gas, sulphur and mineral leases by any State agency which would include lands riparian to upland owners within any bulkhead line lawfully fixed, whether such lands are submerged or filled. The determination having been made that a bulkhead line can be fixed over lands in private ownership, it follows that reasonable regulations can be lawfully established by the appropriate public agency which will provide ample protection to the owners of lands lying within these bulkhead lines from any and all efforts of Coastal to explore for minerals on these lands, whether filled or unfilled, by dredging, digging up the sands, by dragline, sifting of the sands, or by any means whatsoever.

The sovereign police power of the State is not subject to being bartered or contracted away and the State of Florida, through the exercise of its police power, may impose restrictions upon its lessee, Coastal, in its exercise of what Coastal has declared to be its rights to explore for minerals on the submerged and filled lands lying within the bulkhead lines as heretofore lawfully fixed and approved by the Trustees. The Trustees, in the exercise of their sovereign police powers, can require Coastal to secure permit from the appropriate local units subject to approval by the Trustees before commencing any operation to explore for minerals, whether by dredging, digging up the sands by dragline or sifting the sands and irrespective of whether such operation be on submerged or filled lands lying landward of any bulkhead line lawfully fixed or outside of this area.

In view of the statutory limitations and restrictions which were in effect at the time of the execution of the exploratory agreement and the drilling leases referred to herein, it is my firm and abiding conviction that it was never the intent of the Legislature to grant authority to any State agency, nor of the Trustees to grant any rights to drill for oil, gas or sulphur or explore for "minerals" in the areas which are landward of any bulkhead line lawfully fixed and which are considered as riparian to upland ownership, whether filled or unfilled, in private ownership or still held by the Trustees.

The common law rights of upland riparian owners, the history of the legislative intent to protect and even expand upon these common law rights, together with the statutory limitations and restrictions imposed upon this lessee, Coastal, to drill for gas, oil and sulphur or explore for minerals, lead to the inevitable conclusion that any claims made by Coastal that it has a right to drill for oil, gas or sulphur and to explore for minerals on lands, submerged or unsubmerged, within a bulkhead line lawfully fixed, or to be fixed, without the consent of the owners of the areas involved, within the area described in its leases, is without legal foundation or authority and must, therefore, be rejected.

061-51—March 27, 1961

**DADE COUNTY HOME RULE
CONSTRUCTION OF §11, ART. VIII, STATE CONST.; EN-
ACTMENT OF LAWS RELATING TO DADE COUNTY
SCHOOL SUPERINTENDENT AND BOARD OF PUB-
LIC INSTRUCTION—§20, ART. III, §6 ART. VIII
AND ART. XII, STATE CONST.**

To: Cliff Herrell, State Senator, Miami Springs

QUESTION:

May the legislature of Florida enact laws limited to Dade county, relating to its schools, superintendent of public instruction, or board of public instruction, in view of §11, Art. VIII, State Const.?

This question poses the application of §11, Art. VIII, State Const., to the public schools, the county superintendent of public instruction and the board of public instruction of Dade county, which section provides that the home rule charter for Dade county, therein provided for, "may provide a method for abolishing from time to time all officers provided for by §6, Art. VIII, State Const. or by the legislature, *except the superintendent of public instruction*, and may provide for the consolidation and transfer of the functions of such offices," (emphasis supplied) except courts and their officers provided for by the constitution and general laws. Provision is also made that said home rule charter *may not abolish the board of public instruction of said county*. Although the constitution provides that neither the office of county superintendent of public instruction nor the board of public instruction of Dade county may be abolished by the home rule charter of the county, nowhere in said constitutional provision is it expressly provided that the said constitutional provision shall have no application to the public schools of Dade county. The prohibition against the abolition of an office would not seem to be tantamount to a declaration that the constitutional provision has no application to public schools in the county.

There is a distinction between the adoption of special or local legislation by the state legislature, and the adoption of such legislation by the county under §11, Art. VIII, State Const.; the legislature may adopt special and local legislation, except as limited by §20, Art. III, State Const., without regard to general legislation and statutes applicable on the same subject; under the provisions of §11, Art. VIII, Dade county may not adopt such legislation which will conflict with general statutes or laws applicable to two or more counties. It may be that the field of legislation of Dade county, if said §11, Art. VIII, is applicable to public schools, the county superintendent of public instruction, and the county board of public instruction, because of the school code and other general statutes and laws, is limited to a very narrow field, nevertheless should there be *any* field of operation the same would be subject to exercise by the county. Said §11, Art. VIII, was adopted at the general election in 1956; this being true, other provisions in the state constitution, including Art. XII, relating to education, conflicting with said §11, Art. VIII, must give way to said 1956 amendment.

After a careful study of applicable constitutional provisions and their construction in the light of and with said §11, Art. VIII,

we are unable to say that it was the intention of the legislature when it submitted said §11, Art. VIII, or of the electors when they adopted it, to exclude the public schools of Dade county from the operation of said section, in so far as *any* field of operation may be available in the light of general statutes and laws applicable to Dade county and one or more other counties. No legislation concerning the public schools of Dade county may be adopted by the county which will conflict with statutes and laws of the Florida legislature applicable to two or more counties, including Dade county. Prior to the adoption of said §11, Art. VIII, the legislature was authorized to prescribe the powers and duties of the Dade county board of public instruction and of the Dade county superintendent of public instruction (see Art. III, and §6, Art. VIII, State Const.). However, upon the adoption of said §11, Art. VIII, in 1956, the situation was materially changed in so far as local legislation relating to the Dade county schools, the Dade county board of public instruction and the Dade county superintendent of public instruction is concerned. Although the latter school agencies were not abolished, the board of county commissioners of Dade county, as the legislative authority of laws applicable to said county alone, was, by said §11, Art. VIII, given "*full power and authority to pass ordinances relating to the affairs, property and government of Dade county,*" which said ordinances, enacted pursuant to the said amendment and the home rule charter of said county, "may conflict with, modify or nullify any existing local, special or general law applicable *only* to Dade county."

Specific reference is made to the following provisions of said §11, Art. VIII, State Const., having some bearing upon the question considered:

(5) Nothing in this section shall limit or restrict the power of the legislature to enact *general laws which shall relate to Dade county and any other one or more counties in the state of Florida* or to any municipality in Dade county and any other one or more municipalities of the state of Florida, and the home rule charter provided for herein shall not conflict with *any provision of this constitution nor of any applicable general laws now applying to Dade county and any other one or more counties of the state of Florida* except as expressly authorized in this section nor shall any ordinance enacted in pursuance to said home rule charter conflict with this constitution or any such applicable general law except as expressly authorized herein, nor shall the charter of any municipality in Dade county conflict with this constitution or any such applicable general law except as expressly authorized herein, provided however that said charter and said ordinances enacted in pursuance thereof may conflict with, modify or nullify any existing local, special or general law applicable *only* to Dade county.

(6) Nothing in this section shall be construed to limit or restrict the power of the legislature to enact *general laws which shall relate to Dade county and any other one or more counties of the state of Florida* or to any municipality in Dade county and any other one or more municipalities of the state of Florida relating to county or municipal affairs and all such general laws shall apply to Dade county and to all municipalities therein to the same

extent as if this section had not been adopted and such general laws shall supersede any part or portion of the home rule charter provided for herein in conflict therewith and shall supersede any provision of any ordinance enacted pursuant to said charter and in conflict therewith, and shall supersede any provision of any charter of any municipality in Dade county in conflict therewith.

* * *

(9) It is declared to be the intent of the legislature and of the electors of the state of Florida to provide by this section home rule for the people of Dade county in local affairs and this section shall be liberally construed to carry out such purpose, and it is further declared to be the intent of the legislature and of the electors of the state of Florida *that the provisions of this constitution and general laws which shall relate to Dade county and any other one or more counties of the state of Florida . . . enacted pursuant thereto by the legislature shall be the supreme law in Dade county, Florida, except as expressly provided herein and this section shall be strictly construed to maintain such supremacy of this constitution and of the legislature in the enactment of general laws pursuant to this constitution.* (Emphasis supplied).

After a careful study and consideration of §11, Art. VIII, State Const., providing for home rule in Dade county, we hold that under said section and the Dade county home rule charter, *Dade county metro government, may adopt ordinances relative to Dade county schools, its superintendent of public instruction and board of public instruction, provided such ordinances do not conflict with any state statute, law or constitutional provision made applicable to Dade county and one or more other counties.* We do not construe a population act now applicable to Dade county, but ostensibly applicable to other counties upon subsequent population increase, as being applicable to Dade county and one or more counties, within the purview of said §11, Art. VIII, *until some other county has attained the required population under the statute or law.* Such ordinances may not conflict with any provision of the Florida constitution or any statute or law made applicable to Dade county and one or more counties of the state, and any such ordinance hereafter conflicting with such a statute or law, whether by enactment or increase in population, must give way to such statute or law.

We do not believe that the legislature may, subsequent to the adoption of a home rule charter pursuant to §11, Art. VIII, enact any statute or law, applicable to Dade county alone, or so long as Dade county is the only county within the purview of the statute or law, relating to the public schools, the county superintendent of public instruction or the board of public instruction, of said Dade county, and this rule appears applicable to enactments dependent upon population so long as Dade county is the only county within the population mentioned in such an act.

The above observations answer the above stated question in the negative.

061-52—March 30, 1961

HIGHWAYS

STATE ROAD BOARD—AWARDING OF BIDS TO CONTRACTORS WHOSE BIDS HAVE PREVIOUSLY BEEN REJECTED—§§337.14 AND 337.11 (3), F. S.

To: *Thomas T. Cobb, General Counsel, State Road Department, Daytona Beach*

QUESTION:

May the state road board award highway construction contracts to several construction firms who, prior to the revocation or suspension of their respective certificates of qualification, submitted low bids on certain contracts, and who presently are holders of valid certificates of qualification?

From an examination of copies of the minutes of the state road board covering the meetings of said board for Jan. 26, 1961, and March 10, 1961, I find that prior to the date of the revocation, and/or suspension, of the certificates of qualification of the contractors involved herein, said contractors had submitted low bids on several pending construction projects; that as to at least two of said contractors, said low bids were subsequently rejected; that on March 10, 1961, the revocation of the certificate of qualification of one of the said construction firms was rescinded and the board voted to reinstate the certificate of qualification of said construction firm, said reinstatement becoming effective as of that date. These minutes reflect also that the order revoking the certificates of qualification of the remaining contractors involved was rescinded and said contractors were placed on suspension for a period of 60 days, effective Jan. 26, 1961.

I am further advised that the board has not awarded any contracts covering the projects to which the low bids relate.

In view of the board's action of Jan. 26, 1961, rejecting certain of the bids involved herein, I believe the question presented can be stated as to whether or not a bid on a state road board project, which has been rejected, may afterwards, on reconsideration, be accepted by said board.

In 63 C.J.S., Municipal Corp., §1005c., it is recited as follows at p. 587:

c. Reconsideration

Under some conditions, on reconsideration, a rejected bid on a municipal contract may be accepted, and an accepted bid may be rejected.

A bid on a municipal contract which has been rejected may afterward, on reconsideration, be accepted, provided no rights have vested meanwhile, and the bidder consents.

It is pointed out, that until the bid is accepted by way of the award of the contract, no contractual rights are created, and the contractor's bid constitutes nothing more than an offer to enter into a contract (26 Fla. Jur., Public Works and Contracts, §21; *Berbusse v. North Broward Hospital Dist.*, Fla., 117 So. 2d 550), and although a rejection of an offer terminates said offer, it may be later accepted, and an agreement reached, *when the renewed consent of the person who made the offer is obtained*

(17 C.J.S., Contracts, §51; J. R. Watkins Co. v. Stewart, 220 Ala. 43, 124 So. 86).

It is noted that, at all pertinent times, to wit: when the bids were submitted, and when the contracts will be awarded, the contractors involved will have held, or will hold, valid certificates of qualification as required by §337.14, F. S.

It is pointed out that the board is vested with discretion in determining who is and who is not the "lowest responsible bidder" as contemplated by §337.11(3), F. S., and if it exercises this discretion with due fidelity to the public and for the interest of the public, in good faith and without fraud, collusion, corruption or palpable abuse of discretion, its actions will be considered proper.

One of the purposes for requiring competitive bidding for public contracts is to insure that the state will receive the best values at the lowest possible expense. (See 43 Am. Jur., Public Works and contracts, §§42, 44; DuBoise Constr. Co. v. City of South Miami, 108 Fla. 362, 146 So. 833).

If in the exercise of the sound discretion vested in the board, it is concluded that it is in the best interest of the state to reconsider the previous order rejecting the low bids involved, and to now accept same, so as to secure a contract most advantageous to the public, such a reconsideration would seem justified.

The question submitted to us is not to be confused with any question concerning the correctness of the reinstatement of these contractors. The state road board has resolved the question of reinstatement in favor of these contractors, and their reinstatement is now an accomplished fact. The wisdom and policy and responsibility for that decision rests with the state road board. Logically and legally, the reinstatement opens up the question of *whether* the reinstated contractors who were the low bidders on highway construction contracts *may now be reconsidered* for awards of said contracts, these jobs not having been awarded during the period of the revocation, or suspension of the certificates of qualification of these contractors.

It is noted that the action of the board reinstating the certificates of qualification constitutes a determination that these contractors are fully qualified to bid on highway construction projects, and it would seem to follow that such contractors are qualified to perform any work for the state whether the contracts are based on bids submitted prior to the revocation or suspension of the certificates of qualification of the contractors, or subsequent to their reinstatement.

We are unable, under the stated circumstances, to find any legal impediment to such reconsideration, instead this question addresses itself to the sound discretion of the state road board. The wisdom and policy and responsibility for determining the matter lies with the board.

In light of the above, it would seem that the state road board may reconsider its action and accept the offers previously rejected. This acceptance may act to create a contract if the bidders expressly or impliedly manifest their consent to the acceptance of the board.

I trust this answers your question.

061-53—April 3, 1961

RETIREMENT

STATE AND COUNTY OFFICERS RETIREMENT SYSTEM— REQUIRED MEMBERSHIP; DRAINAGE DISTRICTS—CH.

122, §122.02(1), F. S.; CHS. 57-925, 59-1002, LAWS OF
FLORIDA

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Are the officers and employees of the southwest Florida water conservation district and the Peace river valley water conservation and drainage district required to be members of the state and county officers and employees retirement system?

State and county officers and employees within the purview of Ch. 122, F. S., the state and county officers and employees retirement system of this state, "include all full-time officers or employees who receive compensation for services rendered from state or county funds, or from funds of drainage districts or mosquito districts of a county or counties. . .or who receive compensation for employment or service from any agency, branch, department, institution or board of the state, or any county of the state, for service rendered the state or county from funds from any source provided for their employment or service regardless of whether the same is paid by state or county warrant or not; provided that such compensation in whatever form paid shall be specified in terms of fixed monthly salaries . . ." (Emphasis supplied.) (§122.02 (1), F. S.) It thus appears that said section contemplates covering only those officers or employees employed by an agency, branch, department, institution or board of the state, or any county of the state, or of a *drainage district* or mosquito control districts of a county or counties.

The southwest Florida water conservation district was created by Ch. 57-925, and the Peace river valley water conservation and drainage district was created by Ch. 59-1002. The former was comprised of that part of Polk and Highlands counties not included in the central and southern Florida flood control district and all of Hardee, DeSoto, Manatee and Sarasota counties. The latter district included Charlotte county, in addition to those counties already named.

Section 13 of the 1957 act provides:

Flood control or *drainage districts*.—This act shall be liberally construed so as to conform with Ch. 378, F. S., relating to the establishment of water control districts and with any law of a general nature relating to water control districts. (Emphasis supplied.)

The district created by the 1959 law is named the "Peace river valley water conservation and *drainage district*." (Emphasis supplied.)

Section 2 of Ch. 59-1002, creating said district, provides in part:

Section 2. The purpose of the district is to develop plans, programs, and plan works relating to any phase of conservation of ground and surface water resources, water usage, water storage, siltation, salt water intrusion, flood prevention, *drainage* and flood control; . . ." (Emphasis supplied.)

The districts created by the legislature in 1957 and 1959 may or may not be agencies, branches, departments, institutions or boards of the state or any county of the state; this point, however, is immaterial to the present discussion, for in view of the above-quoted provisions of the acts creating the two districts involved, it appears that both should be considered "drainage districts" within the contemplation of §122.02 (1), F. S.

Your question is thus answered in the affirmative.

061-54—April 4, 1961

TAXATION

LOCAL EXCISE TAXES ON UTILITIES SOLD TO THE STATE AND ITS AGENCIES—IMMUNITY—§1, ART. VIII, STATE CONST.; §167.431, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

May municipal corporations and other local governmental agencies impose an excise tax on utilities purchased by the state and its boards, commissions and other agencies?

Although there dealing with ad valorem taxation, the court in *Park-N-Shop, Inc. v. Sparkman*, Fla., 99 So. 2d 571, text 573, remarked that "after a careful study of appropriate provisions of the constitution and statutes we decide that property of the state and of a county, which is a political subdivision of the state, §1, Art. VIII, is immune from taxation." The courts "have generally been unwilling to hold that such (state) property is subject to taxation in any form, unless it is made so by express enactment or by clear implication" (51 Am. Jur. 552 and 553, §561). To the same effect see also 84 C. J. S. 386 and 387, §200 and 2 *Cooley on Taxation*, 4th Ed. 1312-1317, §621.

"Ordinarily a municipality may not levy a tax on an instrumentality or agency of the state government" (53 C.J.S. 476, §10; 16 *McQuillin on Municipal Corp.*, 3rd Ed. 141-144, §44.56). This rule is usually applied to license and excise taxes where the state in its governmental capacity is involved (see Annotations in 60 A. L. R. 878-880; 67 A. L. R. 1310-1311; 117 A. L. R. 855-856; 128 A. L. R. 906-907). These authorities bring us to the conclusion that if municipal or other local excise or license taxes are to be imposed against the state or its agencies that specific authority for the imposition of such a tax against the state and its agencies must exist and be shown. Taxation of the state and its agencies being in derogation of the common law any statute or law providing therefor must be strictly construed.

It is our thought that most municipal corporations depend upon §167.431, F. S., or similar provisions in their municipal charters, as their authority to impose an excise or license tax on the purchase of public utilities, which section provides in part that "the several cities and towns in this state are hereby given the right, power and authority, by non-emergency ordinance, to impose, levy and collect on each and every purchase of electricity, metered or bottled gas (natural, liquefied petroleum gas or manufactured) water service, telephone service and telegraph service in their corporate limits a tax ... in an amount not to exceed ten per cent of the payment received." Under the statute the seller is to act as

tax collection agency for the municipality. The imposition of the taxes authorized by this section of the statutes is against the purchaser, not against the seller, although the seller is required to collect the tax and transmit it to the municipality. The copies of municipal ordinances handed us with your request herein appear to have been adopted pursuant to said §167.431, and impose the tax against the purchaser; which in the cases before us were governmental agencies of the state. "The government, whether federal or state, and its agencies are *not* ordinarily to be considered as within the purview of a statute, however general and comprehensive the language may be, unless intention to include them is clearly manifest, as where they are expressly named therein or included by necessary implication." (82 C. J. S. 554, §317). This rule of construction is applicable to municipal ordinances as well as statutes and laws of the legislature or of the congress of the U.S.

There is no provision in said §167.431, authorizing and permitting the imposition of the excise taxes authorized thereunder against the state and its agencies, unless the following language therein contained should be construed as authorizing levies against the state and its agencies:

Any such ordinance may provide that federal, state, county and municipal governments and their commissions and agencies, and other tax supported bodies, public corporations, authorities, boards and commissions, shall be exempted from the payment of the taxes imposed and levied thereby.

This provision in the said section seems to presume that the federal, state, county and municipal governments, and their agencies, would be subject to taxation unless exempted therefrom; this is not the rule, the opposite being the rule. An examination of the title of the session law from which said §167.431 was derived fails to reveal any expression or language in the title to said act indicating an intention, by said act, to waive the state's immunity from taxation. Should the said language be deemed sufficient to authorize the imposition of the taxes provided by said §167.431, against the state and its agencies, then the language so used would also be subject to the construction that the legislature also intended to authorize the imposition of the tax against the federal government and its agencies; this the legislature could not do and we must presume that the legislature knew that, absence of federal authority, it could not so authorize a tax against the federal government. We do not feel that the above quoted language makes provision for a municipal tax against the state and its agencies by express enactment or by clear implication. The authority granted is one of tax exemption and not one for tax imposition.

No provision is made by said §167.431, F. S., nor by any other general statute or law, for the payment of such taxes by the state. There is no showing in the report of the state budget commission to the 1959 session of the legislature, or otherwise, nor in the 1959 statutes and laws of any appropriation of funds for the payment of taxes imposed under said §167.431.

The above question is answered in the negative, unless the applicant can show statutory authority for the imposition of the tax against the state and its agencies.

061-55—April 5, 1961

COOPERATIVE APARTMENTS
OWNERSHIP—TAXES—HOMESTEAD EXEMPTION—§§4
AND 7, ART. X, §9, ART. IX, STATE CONST.; §§731.05
AND 731.27, F. S.

To: *Tom Adams, Secretary of State, Tallahassee*

QUESTIONS:

1. What are the various cooperative apartment ownership devices in use today?
2. How may the ownership interests under the various ownerships defined in question 1 be transferred?
3. May such ownership interests be willed?
4. How do such interests pass under the statutes of descent and distribution?
5. What are the tax liabilities of the owners of an interest in a cooperative apartment?
6. Under what circumstances would the owner of an interest in a cooperative apartment be entitled to homestead tax exemption?

AS TO QUESTION 1:

Sometimes the title to the separate apartments in an apartment building is owned and held in the name of the apartment owner, separate and apart from the ownership of the other apartments; sometimes the ownership is one of joint tenancy, tenancy-in-common, partnership, or similar, with each tenant, partner or otherwise being entitled to the possession and occupancy of a specified apartment; in these cases the tenant, partner or other owner has a title, not only in the apartment in his possession but also to all other apartments; sometimes the apartments are vested in a trustee who holds the title to the apartments in trust for the use of specified cestue que trustants; sometimes the title to the apartments is vested in a cooperative corporation or other type of corporation, under arrangements whereby the owner of each share or specified number of shares of stock is entitled to the possession and occupancy of a specified apartment.

Most any of such forms of ownership present questions of legal ownership, especially where the apartment building is a multiple story building with apartments not directly connected with the land upon which the building stands. Where some of the apartments are located on the second or other upper floor of the apartment building separate ownership of each apartment presents serious questions as to the exact nature of the ownership of upper story apartments not resting directly on the land upon which the apartment stands. Where the apartment building is owned by a corporation, with the stockholders being entitled to apartment occupancy, the interest of the stockholder would seem to be one of stock ownership and therefore personal property with the legal title in the corporation.

AS TO QUESTION 2:

Whatever the nature of the ownership or right in or to the apartment, such interest, whether deemed real or personal property, would seem to be subject to sale and transfer, except to the extent limited by agreement between the parties or, when owned by a corporation, by charter, by-law or other provisions. Serious questions may well arise in case of the entry of a judgment against

an apartment owner and an attempt to levy on his interests, under the judgment, and sell at execution sale.

AS TO QUESTION 3:

The question of the right of an occupant of an apartment, or person entitled to legal possession of an apartment, to dispose of his interest by will would seem to raise serious legal problems where the interest is claimed to be a homestead. Under §4, Art. X, State Const., an owner of a homestead with children may not dispose of his or her homestead by will; but under §731.05, F. S., a homestead may not be willed whether the homesteader has children or not.

AS TO QUESTION 4:

Where the apartment is owned outright by its occupant, who is the head of a family residing in this state, so that it may not be disposed of by a will, it would pass according to our statutes of descent and distribution. Section 731.27, F. S., provides that where a homesteader is survived by a widow and children, the widow takes a life estate in the homestead and the children take the remainder, share and share alike, the heirs of deceased children taking the interest of such deceased child. Where the title is held in joint tenancy, tenancy-in-common, partnership, or by a trustee or a corporation, questions as to the legal interest of the decedent in the apartment occupied by him may arise and present complicated questions of title, and the actual legal interest of the occupant to the apartment claimed by him.

AS TO QUESTION 5:

Apartments and apartment buildings are liable for county and municipal ad valorem taxes, unless entitled to tax exemption under constitutional or statutory provision. Any person entitled to the \$500 exemption allowed by §9, Art. IX, State Const., to bona fide residents of the state who are widows (sod but not grass), or has lost a limb or been disabled in war by misfortune, or homesteads, under §7, Art. X, State Const., may claim such exemptions. There is a limitation in said §7, Art. X, that seems to be applicable to apartments in large apartment buildings which limitation seems to be subject to correction only by constitutional amendment if the construction apparently placed on the said section in *Overstreet v. Tubin*, Fla., 53 So. 2d 913, is correct and is to be followed. In this case the question arose as to the status of a duplex apartment house, owned by two homesteaders, one owning and making one of the apartments his permanent home, and the other likewise owning his apartment and making the same his permanent home. The court held that there was but a single dwelling house, although composed of two apartments, within the purview of the following provision in said §7, Art. X, State Const., to wit, "no such exemption of more than \$5000 shall be allowed to any one person or to any one dwelling house, nor shall the amount of the exemption allowed any person exceed the proportionate assessed valuation based on the interest owned by such person." In *Overstreet v. Tubin*, each apartment owner was allowed \$2,500 homestead tax exemption, which seems to indicate that had there been 10 apartments, owned separately by their occupants and constituting homesteads, each owner would have been entitled to only \$500 homestead tax exemption had the 10 apartments been contained in a single building.

Sometimes an apartment building, for example, one containing 10 separate apartments, will be owned by the apartment occu-

pants as tenants-in-common, each owner being entitled to occupy one of the apartments, so that his ownership in the apartment occupied by him would be an undivided one-tenth interest, and he would also own an undivided one-tenth interest in the other apartments. Therefore his interest in the homestead property would be an undivided one-tenth interest. The one-tenth interest of such homesteader in the other nine apartments, he not occupying them as his homestead, would seem to be subject to taxation.

AS TO QUESTION 6:

Where a homesteader's title is either a legal title or a beneficial title in equity to the apartment owned and occupied by him he would be entitled to homestead tax exemption, limited, however, to the matters and things last above discussed. For a person to be entitled to homestead tax exemption he must have either a *legal title* or a *beneficial title in equity* to the property owned by him. Under one arrangement sometimes used for cooperative apartments the occupant owns and holds a share of stock in the corporation which ownership entitles him to the permanent occupancy of an apartment *so long as he is the owner and holder of that share of stock*; corporate stock in this state is personal property and not real property; such an occupant of an apartment would not seem to be vested with the required title to real property to entitle him to homestead tax exemption under said §7, Art. X, State Const.

Sometimes cooperative apartments are constructed upon leasehold interests in real property for a fixed term or number of years. "At common law, estates for years were classified as chattels real and regarded as personal property. *Dabney v. Edwards*, 5 Cal. 2d 1, 53 P. 2d 962, 103 A. L. R. 822. Of similar import was the holding in *Townsend v. Boyd*, 217 Pa. 386, 66 A. 1099, 12 L. R. A. (NS) 1148." (*De Vore v. Lee*, 158 Fla. 608, 30 So. 2d 924, text 926). See also 51 C. J. S. 531, §26; 32 Am. Jur. 39, §16; 2 Cooley on Taxation, 4th Ed. 1268, §593; 3 Thompson on Real Property, 1959 Replacement, 6, §1016; *Curington v. State*, 89 Fla. 494, 86 So. 344, text 345; *Mathews v. McCain*, 125 Fla. 840, 170 So. 322, text 325. Being personal and not real property, a leasehold interest for a term of years is not within the purview of §7, Art. X, State Const.

061-56—April 5, 1961

TAXATION

LICENSES AND LICENSE TAXES—TRAVELING SHOWS—
QUADRICENTENNIAL COMMISSIONS—§§13.60, 13.61-
13.72, 205.01, 205.37, 205.68 AND CH. 205, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Are traveling shows, dance bands, and other entertainment facilities, employed by local quadricentennial commissions, at a fixed fee for their services, subject to the requirements of §205.37, F.S., or other similar statutes?

We have some information coming to our attention other than your request for opinion and your file attached thereto, that the Polk county quadricentennial commission, existing under and pursuant to Ch. 59-511 (§§13.61-13.72, F. S.), by contract with a traveling show or bandmaster, procured the services of such traveling show or band, for a fixed fee without regard to the admis-

sion charges and fees charged and collected from the public attending such show or entertainment, in putting on a public entertainment for an admission or fee from the attending public. If these facts are true, then we are presented with the question as to who "operated for profit any place where dancing is permitted or entertainment, such as variety programs or exhibitions, is provided for a charge," as to the show or entertainment in question. Was it the traveling show or band in question, or was it the Polk county quadricentennial commission, that put on the entertainment?

Quadricentennial commissions, organized under said §§13.61 to 13.72, F. S., are public bodies politic "exercising public and essential governmental functions as set forth in this law (§§13.61-13.72, *supra*) and having all powers necessary or convenient to carry out and effect the purposes and provisions of this law." Among these powers is the power "to promote and sponsor a quadricentennial public celebration in commemoration of the 400th anniversary of the permanent colonization of Florida . . . to enter into concession contracts . . . to enter into contracts with any person, firm or corporation . . ." and exercise many other powers mentioned in §13.62, F. S. Among the powers of the commission under §13.65, F. S., is the pledge of funds derived from its operation and ownership of facilities, rental received from facilities, donations and contributions, etc. The Florida quadricentennial commission, under §§13.61-13.72, *supra*, is an adjunct to and agency of the Florida quadricentennial commission, created and established by Ch. 59-510 (§13.60, F. S.), which is in said section declared to be "a public body, exercising public and essential governmental functions."

Section 205.01, F. S., provides that "no person shall engage in or manage any business, profession or occupation, for which an occupational license tax is required by this chapter or other law of this state, unless" the required license be obtained and the license tax paid. (Emphasis supplied.) Section 205.37, F. S., provides that "every person who operates for profit any place where dancing is permitted or entertainment, such as variety programs or exhibitions, is provided for a charge shall pay a license tax . . ." Section 205.68, F. S., defines the term "person" as used in Ch. 205, F. S., as meaning "either person, firm, partnership, corporation, association, executor, administrator, trustee, or other legal entity, whether singular or plural, masculine or feminine, as the context may require." This definition does not seem to include the state or its agencies and instrumentalities, or municipalities and counties. It is a general rule that neither the state nor its agencies is considered to be within the purview of statutes unless the intention to include them is manifest. (82 C. J. S. 554-558, §317). A tax imposed on persons operating and conducting a certain business, or on the owner of such business, is payable by the principal, and not by his agents and employees; however, where the tax is imposed on a particular occupation, one who is engaged in such occupation is not relieved of liability by the fact that he is acting as agent of another (53 C. J. S. 659, §47).

We find nothing in Ch. 205, F. S., or otherwise in the statutes and laws of Florida evidencing an intention to impose §205.37, or other provisions of Ch. 205, F. S., on state and local governmental agencies, such as the Polk county quadricentennial commission. If the show or entertainment in question was put on by the Polk county quadricentennial commission, by and through a band or

persons employed by it for that purpose, then the commission and not its employees put on the show or entertainment. Unless the show or entertainment was a business operated by the traveling show or bandmaster, for their own account, and not for the account of the commission as its employee or employees, §205.37, F. S., has no application here, as the commission is a "public body, exercising public and essential governmental functions."

The question of the obligation, under §205.37, or other provisions of Ch. 205, F. S., for license taxes, as posed in the above question depends upon the factual situation as to who is putting on the show or entertainment, and when this fact is ascertained, whether or not the person or agency putting on the show or entertainment is within the purview of Ch. 205, F. S.

061-57—April 5, 1961

TAXATION

DOCUMENTARY STAMP TAXES—MERGER OR CONSOLIDATION OF CORPORATIONS—§§201.04, 201.05, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

Where two or more corporations are merged or consolidated into a single corporation, is the corporate stock issued in connection therewith subject to taxation under either §201.04 or §201.05, F.S.?

Section 201.04, F. S., imposes an excise tax "on all sales, agreements to sell, or memoranda of sales or deliveries of, transfers of legal title to shares, or certificates of stock . . ." Section 201.05, F. S., imposes an excise tax "on each *original issue*, whether *origination or reorganization*, of certificates of stock issued in the state . . ." Section 4301, title 26, U. S. code, imposes a like tax on "each original issue of shares or certificates of stock, issued by a corporation, whether on organization or reorganization . . ." Section 4321, title 26, U. S. code, imposes an excise tax on "each sale or transfer of shares or certificates of stock, or of rights to subscribe for or to receive such shares or certificates, issued by a corporation . . ." The federal statutes on the same subjects have been quoted from for the purpose of comparing the Florida and federal statutes, from which the Florida Statutes were originally derived. Chapter 15787, 1931, from which Ch. 201, F. S., was largely derived, was largely taken from the federal statute, so that it takes "the same construction in the Florida courts as its prototype has been given in the federal courts, in so far as such construction is not inharmonious with the spirit and policy of our own legislation upon the subject." (State v. Cook, 108 Fla. 157, 146 So. 223, text 224; and see also Gay v. Inter-County Tel. and Tel. Co., Fla., 60 So. 2d 22, text 23).

Original issue, of corporate stock, and *organization and reorganization* of corporations are mentioned and referred to in above §201.05, F. S. In North American Co. v. Green, Fla., 120 So. 2d 603, text 607, the court remarked that "we have the view that there can be no *original issue* of stock by an existing corporation unless there is an actual increase of the capital structure. In other words, to constitute an original issue of the stock it *must represent newly dedicated capital*. Where new shares are issued merely to effect a stock split-up as distinguished, for example, from a stock dividend, no taxable original issue comes into being." (Emphasis supplied.) Original issue, as used in the federal statutes, indicates that, to

be taxable under the federal stamp taxing statutes, stock certificates must be, in point of time, first issued. (U. S. v. Pure Oil Co., CCA Ill., 135 Fed. 2d 578, text 579). New classes of stock representing previously dedicated capital, such as new shares or certificates issued merely to effect a stock split-up, or to convert outstanding common to preferred, or preferred into common, or par to no-par, are not *original issues* (Crown Zellerbach Corporation v. Anglim, DC Cal., 109 Fed. Supp. 514, text 515).

Reorganization of a corporation is the reconstruction or rehabilitation of an existing corporation; sometimes defined to be the process by which a corporation is organized anew, "usually effected by the dissolution of one and the organization of a new corporation to take the property and franchise of the first and to continue its business It has been held that where a new corporation is formed by stockholders and directors of an existing corporation, and its directors and practically all its stockholders, franchises and property are identical with those of the old corporation, the transaction both in fact and in law amounts to a reorganization of the old corporation." (19 C. J. S. 1318, §1578). Corporations may be reorganized by the incorporation of a new corporation or by amendment of its charter (19 C. J. S. 1320, §1581).

Consolidation of corporations occurs where the rights, franchises and effects of two or more corporations are united in a single corporation, the stockholders of which are, so far as they choose to become such, composed of those corporations so uniting, however, the term is elastic (19 C. J. S. 1363, §1603). "A true consolidation, which exists where a new corporation springs into existence to assume the liabilities of the former corporations and the prior corporations are dissolved and cease to exist, should be distinguished from merger, which 'means something more than a mere consolidation' and which exists where one corporation is continued and the others are merged in it without the formation of a new corporation. A consolidation is also to be distinguished from a dissolution; (and) from a reorganization . . . arising from the formation of a new corporation" but continuing the old business under a new name" (19 C. J. S. 1364, §1604).

Merger, as applied to corporations, is the union of two or more corporations by the transfer of property of all to one of them, which continues in existence, the others being swallowed up or merged therein. It differs from a consolidation wherein all the corporations terminate their existence and become parties to a new one (Black's Law Dictionary, 4th Ed., p. 1140). A merger of corporations consists of a combination whereby one of the constituent companies remains in being, absorbing or merging in itself all the other constituent corporations. (13 Am Jur. 1086, §1176).

It appears from what is before us that some seven or more corporations were involved in the mergers or consolidations here involved. The original corporation was organized around 1927, having changed its name around 1935. Another corporation was organized around 1950, having changed its name around 1953. These corporations appear, from the records of the secretary of state, to have merged into a single corporation, retaining the name of one of the merged corporations, in 1954, at which time another existing corporation was merged with them. In 1957, three other existing corporations were merged with the said corporation, the merged corporation retaining the name of the corporation with which said other corporations were merged. The records of the secretary of state indicate that said corporations were merged, no reference

being made in said records to indicate a consolidation or reorganization instead of a merger. With the facts before us, we must presume that said corporations were merged and that there was no reorganization; however, should it be determined upon any further examination of the books and records that there was in fact a reorganization within the above definition, then the facts when applied to the definitions above should control over our tentative determination from the limited facts before us. We proceed for the present upon the assumption that there were mergers and not a reorganization of the corporations.

No attempt is here made to make an audit of the documentary stamp taxes due, if any, by the existing corporation, for shares of stock originally issued by it since the merger, or by it and any of the corporations merged with it prior to merger, for which it would appear to be liable. We shall here deal only with shares of stock issued, either as original issues or as transfers, at the time of the mergers and in connection therewith. In connection with a merger of two or more corporations there is no purchase of the property, by the continuing corporation, of the merging corporations, this because the property of the merging corporations is swallowed up or merged with the continuing corporation. The continuing corporation acquires the property of the merging corporations, and, at the same time, assumes and becomes liable for their obligations. There is no new corporation, as there may be in the case of a consolidation of corporations. Only such stock as tended to increase the capital stock of the merged corporation may be considered as an *original issue of capital stock*. To constitute an original issue of capital stock, such capital stock must represent *newly dedicated capital* not merely the transfer of existing capital. When the corporations were merged, the total outstanding capital stock of each of the merged corporations, as well as that of the continuing corporation, became the obligation of the continuing corporation, although standing in the names of the merged corporations. The calling in of such stock standing in the name of the merged corporations, and the issuance of stock in the name of the continuing corporation, were not the issuance of *original stock* within the purview of §201.05, F. S., unless the same represented additional capital to the amount of the merged capital. Only such original stock as represented newly dedicated capital would seem to be taxable under §201.05, F. S. If the taxes payable under §201.05, F. S., had been paid prior to or at the time of the merger, and no stock representing newly dedicated capital has been issued since said merger, then it would seem that no taxes under said §201.05 would now be due.

We come next to the application of §201.04, F. S., to the stock issued by the continuing corporation to the stockholders of the merged corporations for and in lieu of the stock held by them in the *merged corporations*. It is our view that the outstanding stock in the merged corporations, after the merger is complete, becomes the obligation of the continuing corporation. After the merger, the relationship between the stockholder and the continuing corporation is the same as between the stockholder and the issuing corporation prior to merger. It is presumed that no newly dedicated capital will be represented by the stock issued by the continuing corporation for and in lieu of stock issued by the merged corporations. The Florida and federal statutes in this connection being substantially the same, the federal tax regulations adopted in con-

formity with the federal statutes and bearing upon the same question would seem to be of assistance here. Attention is directed to regulation 43.4321-2(a), providing that federal excise taxes are imposed on the following transactions concerning treasury stock:

Transfer upon a merger from the name of a merging corporation of stock owned by it to the name of the continuing corporation. Similarly, upon a consolidation, a transfer from any of the consolidating corporations to the consolidated corporation.

In addition to the tax on the issuance of stock in connection with a merger or consolidation, where such stock is issued directly to the stockholders of the merging or consolidating corporations by the continuing or consolidated corporation, there is also a transfer tax imposed at the time of the issuance of such stock. The transfer tax is applicable to such a transaction inasmuch as there is involved the transfer to the stockholders of the merging or consolidating corporations of such corporations' right to receive the stock of the continuing or consolidated corporation.

And the following provisions of subsection (b) of said regulation providing that no taxes are due where,

In a consolidation of corporations, the surrender of stock of any of the consolidating corporations in exchange for stock of the consolidated corporation.

In a merger of corporations, the surrender of stock of both the merging and the continuing corporations in exchange for stock of the continuing corporation.

The merger of the several corporations into a single corporation, usually referred to as the continuing corporation, results in a single corporation through such merger, and no newly dedicated capital results from the usual merger. Where no newly dedicated capital results from the merger the mere issuance of stock, in the name of the continuing corporation, to the stockholders of the merged corporations representing no change in dedicated capital, such transaction is not a taxable sale or transfer within the purview of §201.04, F. S.

We do not here appear to be concerned with a consolidation of two or more corporations into a newly formed corporation, such as were held taxable in *Raybestos-Manhattan v. U. S.*, 296 U. S. 60, 56 S. Ct. 63, 80 L. ed. 44, 102 A. L. R. 111; *Niagara Hudson Power Corp. v. Hoey*, CCA NY., 117 Fed. 2d 414; *Koppers Coal and Tran. Co. v. U. S.*, CCA Pa., 107 Fed. 2d 706.

The term *treasury stock* means ordinary corporate stock duly issued and outstanding which has been acquired by the corporation by purchase, gift or otherwise; this term includes the stock of a corporation previously issued and outstanding which it has acquired and holds as assets (13 Am Jur. 318, §199; 18 C. J. S. 645, §212; 42A Words and Phrases, 40-43).

We therefore conclude that where two or more corporations are merged into a single corporation, being one of the merging corporations usually referred to as the continuing corporation, without the dedication of newly committed capital, no taxes are payable under either §201.04 or 201.05, F. S. Where a new and additional corporation is formed, stock issued by it in lieu of stock in the merged or consolidated corporations would seem to be an original issue of stock. Any additional capital, not previously ded-

icated, brought in through or in connection with a merger or consolidation, would seem to be an additional issuance of capital stock so that the portion of the stock representing such additional capital would be subject to taxation.

061-58—April 6, 1961

TAXATION

LIENS OF ASSESSMENTS AND TAXES—PRIORITY—CH. 170,
§§170.09, 192.21, F. S.; CH. 59-396, LAWS OF FLORIDA

To: Ward and Ward, Attorneys at Law, Miami

QUESTION:

Are the special assessments authorized by Ch. 170, F.S., equal in priority to municipal and county ad valorem taxes?

Section 170.09, F. S., provides that the special assessments made under Ch. 170, F. S., "shall remain liens, *coequal with the lien of other taxes*, superior in dignity to all other liens, titles and claims, until paid" This provision was inserted in the law by amendment by §6, Ch. 59-396. Section 192.21, F. S., provides that "all taxes imposed pursuant to the constitution and the laws of this state shall be a first lien superior to all other liens on any property against which such taxes have been assessed which shall continue in full force and effect until discharged by payment." (Emphasis supplied.) The taxes in this state "imposed pursuant to the constitution and laws of this state" are state, county and municipal governmental taxes as distinguished from special assessments (Sanford v. Dial, 104 Fla. 1, 142 So. 233; Allison Realty Co. v. Graves Inv. Co., 115 Fla. 48, 155 So. 745, text 750; Poekel v. Dowling, 108 Fla. 582, 146 So. 662). As to tax sale certificates and liens purchased before the adoption of said Ch. 59-396, the purchaser acquired a vested right in the certificates purchased which was not affected by the adoption of said act (State Adjustment Co. v. Winslow, 114 Fla. 609, 154 So. 325, text same).

Prior to the adoption of said Ch. 59-396, special assessment liens seem to have been inferior to the lien of ad valorem taxes (Sanford v. Dial, *supra*; Tampa v. Barbee, 115 Fla. 46, 155 So. 751; Tampa v. Lee, 112 Fla. 668, 151 So. 316; Miami v. Lee, 112 Fla. 668, 151 So. 317). The statement was made in State Adjustment Co. v. Winslow, 114 Fla. 609, 154 So. 324, text 325, that "when the tax certificate was purchased by the private party at the tax sale, liens for special assessments were not of equal dignity with liens for state and county taxes under the statute." The liens of tax sale certificates in the hands of purchasers could not be impaired by the said amendment made by Ch. 59-396 as aforesaid. Liens of special assessments relate to the date they are acquired rather than the date on which they mature for payment (State Adjustment Co. v. Winslow, 117 Fla. 200, 157 So. 507, text 508, that "there is no valid reason why such liens (special assessments) could not be by legislative act be raised to the dignity and placed on a parity with ad valorem taxes assessed for municipal purposes, but a different condition exists in relation to ad valorem taxes assessed for state and county purposes," where the equality is declared by local or special law. This rule may not be applicable here because the equality of lien is declared by general and not special law.

According to the Winslow decision, if a special or local law

could have the legal effect of making the lien of special assessments in the localities affected equal in dignity to the lien created by the assessment of ad valorem taxes for state and county purposes, the uniformity of taxation guaranteed by the Florida constitution would be destroyed, since the tax lien created by the assessment of ad valorem taxes for county and municipal purposes in one locality would be superior in dignity to liens of special assessments, while in other localities to which the special act applied it would be only of equal dignity with the lien created by such special assessments (157 So. at p. 508). Such reasoning, of course, would not be applicable where such equality in dignity is established by general law of uniform application throughout the state.

Tax liens and special assessment liens are, in this state, creatures of statute. Accordingly, it would seem that the legislature has the power to change the priority of liens, so long as vested rights of lienholders are not violated. In at least one other instance in Florida's history, the lien of special assessments has been declared equal in dignity to tax liens, by general law, and such law has been upheld by the Florida supreme court (See cases of *Rorick v. Reconstr. Finance Corp.*, 144 Fla. 539, 198 So. 494 (1940); *State v. Everglades Drainage Dist.*, 155 Fla. 36, 19 So. 2d 472 (1944), relating to a general law passed in 1917, providing that liens for Everglades drainage district assessments shall be equal in dignity to liens for state and county taxes.) See also *Lainhart v. Catts*, 73 Fla. 735, 75 So. 47 (1917).

In view of the above, it appears that the act of the legislature in 1959, amending §170.09, F. S., has placed liens of special assessments authorized by Ch. 170 on a parity with tax liens.

Your question is thus answered in the affirmative, so far as vested rights of third persons are not adversely affected.

061-59—April 10, 1961

TAXATION

LICENSES AND LICENSE TAXES, UNATTENDED TAXABLE DEVICES; ENFORCEMENT OF TAX DUE—COSTS—CH.

205; §§205.04, 205.65, 205.10, 205.20, 205.21, 205.63, 205.631, 205.632 AND 205.70, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTIONS:

1. Where devices subject to license taxes under Ch. 205, F.S., are put into operation in this state by unknown owners or operators, what procedure should be followed by the tax collector in making collection of the tax due?

2. Where the proceeds of a sale of property for the payment of delinquent license taxes are insufficient to pay the costs and expenses of such sale, by whom should such costs and expenses be paid?

"No person shall engage in or manage any business, profession or occupation, for which an occupational license tax is required by this chapter (Ch. 205, F. S.), or other law of this state, unless a state license, or a state and county license, or a county license, as the case may be, shall have been procured from the tax collector of the county where the place of business may be located" Some of the businesses mentioned in Ch. 205, F. S., such as the furnishing of advertising space, operation of amusement devices,

coin operated vending machines and devices, radios, etc., (see §§205.20, 205.21, 205.63, 205.631, 205.632 and 205.70, F. S., for examples) are often unattended by the owners and operators for extended periods of time, so that it may be difficult or even impossible for the tax collector to determine ownership of the same or by whom the same is operated or managed.

Under §205.65, F. S., it is made a misdemeanor for any person, firm or corporation to maintain or operate devices, machines, businesses, professions or occupations for which a license tax is required without obtaining such a license (§205.65, F. S.). "All licenses shall be payable on or before the first day of October of each year" (§205.04, F. S.), and "whenever any person who is subject to the payment of a license or privilege tax . . . shall fail to pay the same when due the tax collector . . . may issue a warrant directed to all and singular the sheriffs of the state, commanding them and each of them to levy and sell any real or personal property of the person liable for said tax within his respective jurisdiction for the amount thereof and the cost of executing the warrant" (§205.10, F. S.). It is self-evident that whenever a taxable device, machine or item is operated in this state under circumstances making it liable to a license tax under Ch. 205, F. S., a tax is due and payable because of such operation although the owner, operator or manager of the device may be unknown to the tax collector. Under §205.10, F. S., the property of the operator or owner of the device subject to license tax is made liable for such tax, and is subject to seizure and sale for the payment of the tax. This property would seem to include the property so operated as to be subject to the license tax in question. Where the owner is known and a warrant is issued pursuant to §205.10, the property so operated as to be liable for a license tax may be seized and sold.

Where the statutes prescribe no method of collection, license taxes must be enforced by an ordinary civil action (*Johnson v. Armour*, 31 Fla. 413, 12 So. 842, text 845). We find nothing in §205.10, F. S., relating to the collection of delinquent license taxes by tax warrant, or otherwise in this state authorizing or permitting the issuance of in rem tax warrants directing the seizure of specific and described property, where the owner of the taxable property is unknown and cannot be ascertained. Although provision is made for, under some circumstances, chancery proceedings where parties are unknown (§§48.01, 66.30-66.32, etc., F. S.) and for the issuing of process against unknown parties, we find no like provision in the statute relative to common law actions, tax warrants, etc.

From the above and foregoing, it is evident that no provision is now made in the statutes for the collection of the taxes under the facts as outlined in question 1. This would seem to raise a suggestion of an amendment of §205.10, F.S., so as to permit the issuance of an in rem warrant against the property so used.

Where the proceeds of a sale of property for the payment of delinquent license taxes are insufficient to pay the costs and expenses of such sale, we feel that the payment of such costs and expenses would be an obligation of the office or agency for which or by which issued. Where the property to be seized is of little or no value, so that upon its sale doubt exists as to whether or not it will bring enough on a tax sale to pay the expenses, extreme care should be exercised and if it is clear that nothing will be accomplished by the sale no warrant should be issued; however, when no warrant is issued for that reason a full explanation should

be made upon the occupational license record showing why, in the opinion of the officer, it would not bring enough to pay costs or expenses of sale.

061-60—April 10, 1961

REGULATION OF TRADE AND COMMERCE
RETAIL INSTALLMENT SALES CONTRACTS AND REVOLV-
ING ACCOUNTS—WRITTEN PROMISES TO PAY MONEY
—DOCUMENTARY STAMP TAXES—§§520.30-
520.42, 201.08, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Must retail installment contracts and revolving accounts contain written promises to pay money to be within the purview of §§520.30-520.42, F.S., known as the retail installment sales act?

The term "retail installment transaction" is defined in §520.31, F. S., as a "contract to sell or furnish or the sale of or the furnishing of goods or services by a retail seller to a retail buyer pursuant to a retail installment contract or a revolving account." A "retail installment contract" is defined in the same section as "an instrument or instruments reflecting one or more retail installment transactions entered into in this state pursuant to which goods or services may be paid for in installments." The latter definition does not include "revolving accounts," which are defined in the same section as "an instrument or instruments prescribing the terms of retail installment transactions which may be made thereafter from time to time pursuant thereto, under which the buyer's unpaid balance thereunder, whenever incurred, is payable in installments over a period of time under the terms of which a time price differential is to be computed in relation to the buyer's balance from time to time."

Section 520.34, F. S., provides that "every retail installment contract shall be in writing and shall be completed as to all essential provisions prior to the signing thereof by the buyer," and further that "no retail installment contract shall be signed by the buyer when it contains blank spaces to be filled in after it has been signed," and that "the seller under any retail installment contract shall, within 30 days after execution of the contract, deliver or mail or cause to be delivered or mailed to the buyer . . . any policy or policies of insurance the seller has agreed to purchase in connection therewith . . ."

Section 520.35, F. S., provides that "every revolving account shall be in writing and shall be completed prior to the signing thereof by the retail buyer," and that "no account executed on or after January 1, 1960, shall be signed by the buyer when it contains blank spaces to be filled in after it has been signed," and that "all accounts executed on or after January 1, 1960, shall state" certain matters required by the statutes. Both §§520.34 and 520.35, F. S., require that both retail installment contracts and revolving accounts contain a notice to the buyer that "do not sign this before you read it or if it contains any blank spaces. You are entitled to an exact copy of the paper you sign . . ." (Emphasis supplied).

From the above and foregoing it is evident that retail installment contracts and revolving accounts, at least to the extent

required by §§520.34 and 520.35, F. S., must be in writing signed by the purchaser. Although an examination of §520.34, F. S., requires that the retail installment contracts thereunder show the sales price of the goods or services obtained, the amount of the down payment, the unpaid balance, and other required information, we find therein no express requirement that the instrument contain an express promise to pay the balance due, although it is explicit from the whole statute that payment is clearly contemplated and would be implied from such instrument. We cannot, therefore, say that the contracts executed in accordance with §§520.34 and 520.35, F. S., may be conclusively presumed to contain a written obligation to pay money within the purview of §201.08, F. S. It may be possible to conform to §§520.34 and 520.35, F. S., and give the information therein required without there being more than an implied promise to pay money.

Although most retail installment contracts and revolving accounts under §§520.34 and 520.35, F. S., would doubtless contain written promises to pay money, within the purview of §201.08, F. S., we are not prepared to say that contracts cannot be drawn so as to conform to said §520.34 and §520.35, without containing a written promise to pay. This being true, we cannot answer the above question in the affirmative.

061-61—April 12, 1961

SHERIFFS

DISPOSAL OF EQUIPMENT, PROCEDURE—§§30.53, 30.49 (2), 30.50 (4), (6); 274.09; CHS. 129 AND 274, F. S.

To: *Bryan Willis, State Auditor, Tallahassee*

QUESTIONS:

1. May a sheriff dispose of equipment of his office including motor vehicles which is the property of the county by either sale or trade-in on any equipment (a) with the approval of the board of county commissioners? (b) without the approval of the board of county commissioners?

2. Should the board of county commissioners dispose of such property?

AS TO QUESTION 1:

Section 30.53, F. S., provides as follows:

The independence of the sheriffs shall be preserved concerning the purchase of supplies and equipment, selection of personnel, and the hiring, firing, and setting of salaries of such personnel; provided that nothing herein contained shall restrict the establishment or operation of any civil service system or civil service board created pursuant to §34, Art. XVI, of the constitution of Florida, provided, further that nothing contained in §§30.47-30.54 shall be construed to alter, modify or change in any manner any civil service system or board, state or local, now in existence or hereafter established.

Chapter 274, the county tangible personal property control law, vests the board of county commissioners with supervisory authority over certain tangible personal property owned by counties. Section 274.09, F. S., requires that the provisions of Ch. 274 be liberally interpreted to be cumulative and supplementary to any general, special, or local law heretofore or hereafter enacted.

In keeping with said section, and in accordance with the requirements of §30.53, F. S., supra, (see AGO 060-18) it is my opinion that the sheriff, in keeping with the legislative pronouncement that his independence should be maintained in connection with the purchase of equipment, would be authorized to trade in such equipment on any equipment being purchased by the sheriff's office without the approval of the board of county commissioners.

Where the sheriff has included in his budget an amount for the purchase of new equipment and as a part of the purchase price of such equipment receives a credit for used equipment traded in, it would appear that the amount of reduction in the expenditure of equipment funds resulting from such transaction should be considered by the county in connection with release of such funds to the sheriff's office. It should be noted that §30.49(2), F. S., requires an itemization of expenditures in the sheriff's proposed budget as follows:

- (a) Salary of the sheriff.
- (b) Salaries of deputies and assistants.
- (c) Expenses, other than salaries.
- (d) Equipment.
- (e) Investigations.
- (f) Reserve for contingencies.

Section 30.50(4), F. S., authorizes the sheriff, in his discretion, to transfer the reserve for contingencies to any of the budget appropriations. Section 30.50(6) requires that the unexpended balances at the end of each fiscal year shall be refunded to the board of county commissioners and deposited to the county fund or funds from which payment was originally made.

In view of the statutory provisions herein discussed, it would appear that where, for example, the equipment fund of the sheriff's office contained an amount to be used for the purchase of any motor vehicles, and that in connection with such purchase—because of trade-in allowances—the actual amount expended for the purchase of the new motor vehicles would result in an actual monetary outlay of less than that appropriated in the budget for those items, the sheriff would be unauthorized to transfer such resulting surplus to any of the other expenditure classifications of the sheriff's budget. Such surplus would revert to the board of county commissioners and to the fund or funds from which payment to the sheriff was originally made. Such procedures are in keeping with the sheriff's budget law and with the well established principles pertaining to the budgeting and spending of public moneys long adhered to by state agencies operating under the budget commission and state budgetary laws as well as the principles for the spending of public moneys by boards of county commissioners operating under the provisions of Ch. 129, F. S., the county budget law.

Proper safeguards should also be established by the sheriff to assure that the county receive full value for the equipment traded in and that the books and records of the sheriff's office properly reflect such value and the complete details of the transaction, because when the sheriff purchases substantial items of equipment, he does so as trustee for the county. See AGO 057-386.

In view of the above comments, question 2 need not be answered.

061-62—April 14, 1961

JUDICIAL DEPARTMENT

STATUS OF TERMS OF ASSISTANT STATE ATTORNEYS,
15TH JUDICIAL CIRCUIT—CHS. 26586, 1951; 17085, 1935;
16784, 1935; 11830, 1927, LAWS OF FLORIDA; §§27.21,
27.22, 114.04, F. S.—§5, ART. VII, FORMER §45,
ART. V., STATE CONST.

To: *Farris Bryant, Governor, Tallahassee*

QUESTIONS:

1. Is the 15th judicial circuit of this state, by reason of increased population, entitled to an additional assistant state attorney?

2. Is there a present vacancy in the office of assistant state attorney for the said 15th judicial circuit, and if so, for what term does the vacancy exist?

The 15th judicial circuit embraces and includes Broward and Palm Beach counties, which counties, according to the 1960 federal census, have a total population of 562,052, with Broward county having a population of 333,946, which brings the circuit within the purview of Ch. 26586, 1951, which chapter provides in so far as here material, that "in each judicial circuit of the state of Florida, which embraces and includes a county having a population of more than 325,000 people, according to the last preceding federal census, it shall be the duty of the governor of the state of Florida, by and with the consent of the senate, to appoint two assistant state attorneys to assist the state attorney of such circuits . . . the term of office of said assistants shall expire with that of the state attorney . . ." The 15th judicial circuit is clearly within the purview of said Ch. 26586, 1951, and entitled to two assistant state attorneys with terms running concurrent with that of the state attorney. At the present time it appears that the 15th judicial circuit has an assistant state attorney; it follows, therefore, that the said circuit is entitled to an additional state attorney. These remarks answer question 1 in the affirmative.

When the 15th judicial circuit was established by chapter 17085, 1935, pursuant to the requirements of former §45, Art. V, State Const., it consisted of Broward and Palm Beach counties, and, there being no change in the statutes and laws in this respect, the said judicial circuit is still composed of the same two counties. Under Ch. 16784, 1935, providing for the appointment, terms, powers, duties, etc., of assistant state attorneys for most of the judicial circuits created as aforesaid, provision was made, by §3, Ch. 16784, for the appointment, by the governor, by and with the consent of the senate, of assistant state attorneys in judicial circuits having a population of less than 190,000 according to the last preceding state census, for four-year terms of office running in cycles, beginning on July 31, 1935. This section was brought into the Florida Statutes as §27.21, F. S. Section 5 of said Ch. 16784, provided for the appointment, terms, powers, duties, etc., of assistant state attorneys for judicial circuits having a population, according to the last preceding state census, of more than 190,000, a county with a population of more than 180,000 and a specified number of circuit judges. This section was brought into the Florida Statutes as §27.22. The 15th judicial circuit, with a population of 103,031, according to the 1935 state census, was within the purview

of said §3, Ch. 16784, so that the terms of office of such assistant started out in cycles of four years, beginning on July 31, 1935. With a total population of 162,753, according to the 1945 state census, the 15th judicial circuit continued to be within the purview of said §3, Ch. 16784, which became §27.21, F. S.

Under the 1950 federal census, made also a state census by the 1950 amendment of §5, Art. VII, State Const., the 15th judicial circuit had a population of 196,621, but no county with a population of more than 180,000, so as to bring it within the purview of said §27.22, F. S. However, it appears that said population brought the said judicial circuit within the purview of Ch. 11830, 1927, held in force and effect by the opinion of the attorney general of July 5, 1935 (1935-1936 AGO 682), which act provides for an assistant state attorney in circuits having a population of more than 100,000 and two or more circuit judges. We deem this act to have been amended by implication, by said Ch. 16784, so as to apply to judicial circuits with populations of more than 190,000, later by further amendment of more than 192,000, not within the purview of §27.22, F. S. Said Ch. 11830, provides terms of four years for the assistants appointed thereunder with such terms running concurrent with that of the state attorney. The 1950 census took the assistant state attorney for the 15th judicial circuit from under §27.22, F. S., and placed it under said Ch. 11830, 1927, thereby effecting a change in the beginning and ending of terms. Terms of office of this assistant state attorney, at least after the termination of the then existing terms, subsequent to the 1950 census, in the 15th judicial circuit, ran concurrent with that of the state attorney.

It appears from the records of the secretary of state that notwithstanding the above mentioned change in the beginning and ending of terms of office, appointments have been made by the governor and consented to by the senate, and commissions issued to the appointees, purporting to be for terms running in four-year cycles from July 31, 1935. Appointments have been made and commissions issued for terms expiring on July 31, 1955, July 31, 1959, and July 31, 1963, when the terms in law expired in January 1953, 1957, 1961 and 1965. "The law and not the commission issued to an officer controls as to the term of office" (*State v. Taylor*, 108 Fla. 541, 146 So. 549, text 550; to the same effect, see also *Advisory Opinion*, 14 Fla. 277, text 281; *Advisory Opinion*, 31 Fla. 1, 12 So. 114, text 116; *State v. Amos*, 101 Fla. 114, 133 So. 623, text 625; *State v. Collins*, 101 Fla. 371, 134 So. 595, text 596; *State v. Bird*, 108 Fla. 541, 163 So. 249, text 254). The senate confirmed appointments for successive four-year terms for the assistant state attorney for the 15th judicial circuit as follows: April 16, 1947, for a term ending July 31, 1951; June 1, 1951, for a term ending July 31, 1955; June 1, 1955, for a term ending July 31, 1959; and May 29, 1959, for a term ending July 31, 1963.

Under the above rule that the law and not the commission determines the term of office, it appears that the passing of the circuit into the purview of Ch. 11830, upon the publication of the 1950 census, and the placing of the term of office for the assistant state attorney of the 15th judicial circuit on the cycle of terms of the state attorney, that the appointment and confirmation of June 1, 1951 may well have been for a term ending in January 1953, that of June 1, 1955 for a term ending in January 1957, that of May 29, 1959 for the term ending in January 1961. However, the question of term of office is here immaterial, except as to the time for which

the commission is to run, in that the appointee for the purported term ending in 1963 resigned his office and a successor was appointed to serve until the end of the 1961 senate unless an appointment be made and confirmed at an earlier date. Under §114.04 F. S., this vacancy must be filled by appointment and confirmation at the 1961 senate. This answers question 2 in the affirmative.

We feel that by reason of Chs. 11830 and 26586, 1927 and 1951, the appointment to fill the vacancy should be for the remainder of the term commencing on the first Tuesday after the first Monday in January 1961 and ending on the same day in 1965.

061-63—April 19, 1961

TAXATION

TAX EXEMPTION OF REAL PROPERTY HELD AND USED BY NONPROFIT CORPORATIONS—§1, ART. IX, §16, ART. XVI, STATE CONST., §192.06, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

When is the real and tangible personal property of a nonprofit and other eleemosynary corporation in this state entitled to tax exemption?

We have before us questions concerning the tax exempt status of the Senior Citizens Services, Inc., a nonprofit corporation, among the powers of which, as expressed in said charter, is "to use and apply the property and funds of the corporation exclusively for such charitable, religious and educational purposes as the board of directors may deem advisable and proper."

Another question concerns the Boca Raton Bible Conference Grounds, Inc., a nonprofit corporation, among the powers of which is the maintenance of "a truly Christian bible conference ground in the town of Boca Raton, Florida," evidently to be used as an assembly ground. We are also advised that this organization may contemplate the ownership of several apartment houses or rental units to be rented to individuals attending meetings on the said conference grounds.

Another question concerns a farm owned and operated by the church of latter day saints for the welfare of needy members of that church. We are advised that "all of the products raised on the farm are distributed to the needy members" of the said church, and "if there is a surplus, this surplus is traded for another commodity, or sold and the money held for the operation of this particular farm."

Under §1, Art. IX, State Const., the constitution provides for the taxation of real and personal property and authorizes the legislature to exempt "such property as shall be exempted by law for municipal, education, literary, scientific, religious or charitable purposes." Under §16, Art. XVI, State Const., the property of all corporations, excepting a cross state canal, "shall be subject to taxation unless such property *be held and used exclusively* for religious, scientific, municipal, educational, literary or charitable purposes." (Emphasis supplied.) In *Lummus v. Fla. Adirondack School*, 123 Fla. 832, 168 So. 232, it was stated that "the constitution and statutes do not contemplate that the property of a corporation or an educational institution which may be exempt from taxation shall be held, occupied, or used for profit of any nature or extent, except that which may be incidental to the occupancy and use for educa-

tional purposes." It was further stated that the "purpose of §16, Art. XVI, is to forbid the further granting by statutory exemptions of corporate property from taxation as had been done (see chapter 610, Laws of Florida) by limiting exemptions from taxation of the property of corporations to the purposes stated in the organic section, so as to expressly require corporate property to be taxed or exempted in accord with §1, Art. IX." It is also stated in this case that "*it is the property and not the corporate entity which is exempt;*" (emphasis supplied); to the same effect see also *State v. Doss*, 150 Fla. 486, 8 So. 2d 15, text 16.

In the last mentioned case reference is made to what is now §192.06(3), F. S., and to §1, Art. IX, State Const., and it is stated that "we think the very purpose of the quoted part of chapter 19376, 1939 (above subsection (3)) was to give tax assessors a pattern to guide them in assessing and exempting such properties. If the property is actually occupied and used for one or more of the purposes stated and not more than 75% of the floor space is rented and the rents, issues and profits used for municipal, educational, literary, scientific, religious and municipal purposes, the property is exempt from all state, county and municipal taxes." In *Johnson v. Sparkman*, 159 Fla. 276, 31 So. 2d 863, text 865, the court remarked that "property exempt from taxation under the constitution for charitable and educational purposes has reference only to such property as is dedicated to the public and used exclusively for that purpose or to such extent as §192.06, F. S., defines. Mere *incidental use* for such purposes is not enough." (Emphasis supplied.) Under §16, Art. XVI, State Const., "it is the property and not the corporate entity which is exempt." (*Lummus v. Florida Adirondack School*, 123 Fla. 832, 168 So. 232, text 238). "The right to the exemption is determined by the use the property is put to and not by the character of the corporate owner." (*State v. Doss*, 150 Fla. 486, 8 So. 2d 15, text 16; *State v. Doss*, 146 Fla. 752, 2 So. 2d 303, text 304; *Lummus v. Fla. Adirondack School*, *supra*; *Univ. Club v. Lanier*, 119 Fla. 146, 161 So. 78, text 79).

Before property may be granted tax exemption under §1, Art. IX, and §16, Art. XVI, State Const., as implemented by §192.06, F. S., *such property must be actually held and used* (as defined in said §192.06) *for one or more of the purposes mentioned in said constitutional provisions.* (*University Club v. Lanier*, *supra*; *Dr. William Howard Hay Foundation v. Wilcox*, 156 Fla. 704, 24 So. 2d 237).

In *Dr. William Howard Hay Foundation v. Wilcox*, *supra*, the procedure for claiming the exemption is set out as follows: "To claim the exemption from taxation as thus provided the property must be *actually held and used exclusively* for one or more of the purposes stated in the constitution. Whether or not it is so owned, occupied and used is a *question of fact* that must be established by competent proof, if challenged. In determining the status of property of this kind, taxing officials should exercise a reasonable discretion and not put the owner to the expense of a law suit if the property is in good faith being used for one or more of the purposes that entitle it to exemption." (Emphasis supplied.) Although the charter of a nonprofit or eleemosynary corporation may be examined to determine its authority to hold and use property for religious, scientific, municipal, educational, literary or charitable purposes, such charter will not determine its right to tax exemption. Notwithstanding the provisions of its charter, or the statutes and

laws under which incorporated, such charter is not conclusive as to the actual purpose and use of its property.

Whether the property of such a corporation is held and used exclusively (within the purview of §192.06(3), F. S.), is a question of fact to be determined by the taxing officials, from evidence readily available to the public and from evidence furnished by the person, firm or corporation claiming tax exemption; and, unless the taxing officials find, from the evidence and facts available and made available to them, that the property, within the rules provided in §192.06, F. S., and §1, Art. IX, and §16, Art. XVI, State Const., is held and being used exclusively for such purposes, it should not be granted tax exemption, but if so held and used it should be granted the exemption.

From the above and foregoing, we conclude that the nature and purposes of a corporation or other group, including their charter, constitution or by-laws, is not controlling as to their right to tax exemption, under §1, Art. IX, and §16, Art. XVI, State Const., and §196.02, F. S., such right to exemption being determined by the purpose and use of such property. Unless found to be held and used exclusively for one or more of the enumerated purposes exemption may not be granted.

061-64—April 20, 1961

TAXATION

TAXATION OF ASSETS OF COOPERATIVE ASSOCIATIONS—

CHS. 618, 200, AND 199, F. S.—§§192.01, 193.12, 193.19,
199.07, 200.08, 618.07, F. S.; §1, ART IX, §16, ART XVI,
STATE CONST.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

It was held in our opinion of Oct. 11, 1960, that the reserves, surplus and net income of an agricultural cooperative marketing association are not to be considered when determining the value of its corporate stock; this being true, to whom should such reserves, surplus and net income be assessed for tax purposes?

The opinion of Oct. 11, 1960 (AGO 060-166) considered the corporate stock issued by agricultural cooperative marketing associations, under Ch. 618, F. S., as intangible personal property for the purposes of taxation under Ch. 199, F. S., and did not consider the taxation of the property, reserves, surplus and net income and other property held by the marketing association itself, prior to the time such property, reserves, surplus and net income have been segregated and allocated to the members as a dividend or otherwise so as to segregate it from the mass of property of the marketing association. Associations organized and existing under said chapter are "deemed 'non-profit' inasmuch as they are not organized to make profit for themselves, as such, or for their members, as such, but only for their members as producers." Reserves and surplus, as well as net income, when distributed must be made to members 'on the basis of patronage,' " and not on the basis of stock ownership. Member ownership of assets, including reserves, surplus and net income, is not dependent upon stock ownership but upon patronage. Until the interest of individual members has been ascertained such interest cannot be taxed, because until the property of a member is determined and segregated from the bulk of

the property of the association no description thereof or valuation may be made for purposes of taxation.

Property exists in the hands of the cooperative association, notwithstanding the absence of any segregation and allocation of the separate interests of the several members of the said association. Florida "is a democracy in which every parcel of property is expected to bear its due portion of the burden of government, unless exempted" by law (*Bancroft Inv. Corp. v. Jacksonville*, 157 Fla. 546, 27 So. 2d 162, text 170). It was stated in *Schleman v. Guaranty Title Co.*, 153 Fla. 379, 15 So. 2d 754, text 759, that "chapters 199 and 200, F. S., 1941, are complementary. They are mutually exclusive. Together, they purport to comprehend all personal property subject to taxation. Presumably, every item of taxable personal property falls within the scope of one, or the other, of the chapters. Section 16, Art. XVI, of the State Const., provides that the property of all corporations, except a ship or barge canal across the state, shall be subject to taxation, unless such property be held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes. See also §1, Art. IX, of the said constitution. We know of no statutory or constitutional provision providing tax exemption for property held and used by agricultural cooperative marketing associations.

It is evident that the reserves, surplus, net income and other assets of a cooperative marketing association, whether owned or merely held by it as trustee for others, whether the same consists of real or personal (tangible and intangible) property is subject to taxation in the county where it has its situs. Such property, unless exempted by some valid constitutional or statutory provision, is subject to taxation, whether it be real property, tangible personal property or intangible personal property, without regard to the holder of the title to such property. This office by its opinion of Dec. 8, 1955 (AGO 055-325) held that the "assets of the cooperative are held by it as trustee or agent for its members. The relationship between such a cooperative and its members is that of trustee to his beneficiary or between a principal and his agent. The assets of the cooperative are held by it as trustee or owner for its members and not as the separate property of the association. Although it may be that the cooperative holds the bare legal title, the beneficial title is vested in the members of the cooperative," *on the basis of patronage*.

The reserves, surplus, net income and other assets of a cooperative marketing association may be invested in or consist of real or personal property, including tangible or intangible personal property. Such property, having a situs in this state, would seem to be subject to taxation, under §192.01, F. S., which provides that "unless expressly exempted from taxation, all real and personal property in this state, and all personal property belonging to persons in this state, shall be subject to taxation in the manner provided by law." Under §193.12, F. S., "every person owning or having the control, management, custody, direction, supervision or agency of property of whatsoever character that is subject to taxation under the laws of this state, shall return the same for taxation. . . ." To the same effect see also §§199.07 and 200.08, F. S., relating to intangible and tangible personal property. Provision is made in §§193.19, 199.07 and 200.08, F. S., for the assessment of trust properties in the name of the trustee or trustees. Where trust properties are assessed the owner, holder, custodian, etc., should be designated in

his, her, or its representative character. The powers and authority of cooperative marketing associations, under §618.07, F. S., include the holding and disposing of real and personal property.

Until segregated and allocated to its members in accordance with Ch. 618, F. S., or otherwise, so as to vest title and right of possession in its members, the assets, reserves, surplus and income of a cooperative marketing association, organized under said Ch. 618, are vested in said association, although in the nature of a trust, and subject to taxation under the statutes and laws of the state, in the manner therein provided. This seems to answer the above stated question.

Although §193.19, F. S., requires that where a person is assessed as trustee, guardian, etc., that his representative character be added to his name, it is our thought that an assessment in the name of an agricultural cooperative marketing association meets this requirement because, as a matter of law above discussed, the cooperative marketing association holds title in the nature of a trustee for its members. This does not mean that an intangible assessment may be made against the association specifically as to the interest of the stockholders; but the assessment is of the property of the association or held by it as aforesaid, whether it be real or personal (tangible or intangible) property.

061-65—April 20, 1961

SCHOOL CODE

COUNTY SCHOOL SYSTEM—EXPENDITURE OF INTERNAL ACCOUNTS, AUTHORIZATION—CH. 237, §237.02, F. S.

To: *Thomas D. Bailey, State Superintendent of Public Instruction, Tallahassee*

Does the principal of a school and the county superintendent have the authority to make expenditures from the athletic fund of the school's internal accounts without prior approval of the school board?

I assume that the athletic fund referred to is an internal account of the county school system. If this is so, it is my opinion that the account would be subject to the same safeguards and restrictions imposed by Ch. 237, F. S., on all county public school financed accounts and expenditures.

Procedures for expenditures under policies and budgets fixed by the county school board are provided in §237.02, F. S.

Expenditures must be made in accord with procedures established by the board or upon specific authorization of the board.

These procedures necessarily vary with the type and size of the expenditure, including the purchase of goods, supplies and services and the employment of personnel.

I believe these general procedures are clearly set forth in Ch. 237, F. S.

Answering your question in broad general terms and without specific application to any particular factual situation, the question as presented must be answered in the negative.

061-66—April 25, 1961

EDUCATION

SCHOLARSHIPS — CONSTRUCTION OF §§550.08, 239.59, 239.47,
FORMER 282.03 (7), 239.25-239.27, 239.37-239.441 F. S.

To: *Ralph Turlington, Representative, Alachua County, Tallahassee*

QUESTION:

Does §550.08, F.S., authorize the board of control to use the funds provided therein for student loans as well as scholarships?

Section 550.08, F. S., provides, in part:

... provided the state racing commission is authorized to grant one additional day of racing during the race meeting period granted to any track as provided by law, upon application and agreement by any track in which one specific day of any meet shall be set aside, and all profit, less actual operating costs, from such specific day's operations of such track including all taxes payable to the state or any agency thereof for such day's operation shall be paid into the state treasury for a scholarship fund which shall be administered by the board of control of the institutions of higher learning of the state for the granting of scholarships for the purpose of attending the institutions of higher learning of the state upon such terms and conditions as the said board may from time to time prescribe. (Emphasis supplied.)

This act does not define the word "scholarship" specifically as being limited to grants as contrasted to loans.

The word "scholarship" is used broadly in various sections of the Florida Statutes. In some cases it contemplates a loan which may be repaid either in money or in service to the state, such as the teacher training scholarships provided in §§239.37-239.441, F. S.

Various other kinds of state scholarships are provided for nursing training in §239.47; osteopathic medicine training in §239.59; state welfare board educational scholarships in §282.03 (7); Stonewall Jackson memorial scholarships in §239.38; university of Florida agricultural department in §§239.25-239.27, F. S.

In view of the fact that the word "scholarship" as used in §550.08, F. S., is not specifically defined to mean grants only and that the act does provide that the scholarships are to be awarded by the board of control "upon such terms and conditions as the board may from time to time prescribe," it is my opinion that the board is authorized to utilize the funds in question for the award of loan scholarships as well as outright grants.

Your question is therefore answered in the affirmative.

061-67—April 25, 1961

COUNTY SCHOOL SYSTEM
MEMBERS OF COUNTY BOARDS OF PUBLIC INSTRUCTION,
COUNTYWIDE REPRESENTATIVES—§§230.061, 230.11, F. S.

To: *Thomas D. Bailey, State Superintendent of Public Instruction,
Tallahassee*

QUESTION:

With reference to §230.061, F.S., is it the legislative intent that the board members residing in any four of the districts shall recognize the particular knowledge of a member of the fifth district with regard to matters pertaining to the schools in his own district as a matter of comity?

I believe your question is answered by §230.11, F. S., which provides:

County board members to represent entire county.—

The county board of each county shall represent the entire county. Each member of the county board shall serve as the representative of the entire county, rather than as the representative of any district in the county.

In other words, official action relating to any member district in the county must be accomplished by the board rather than delegated to the member living in the district. The individual board members must recognize their responsibility to the entire county school system.

I assume that members of the board as a matter of policy would desire the advice and counsel of the member whose residence in a given district would enable him to have special knowledge on matters of information relating to the district in question. The individual member's opinion, however, would not be binding on the entire board and all official decisions must be made by the board itself.

061-68—April 26, 1961

REGULATION OF VOCATIONS AND PROFESSIONS
FLORIDA REAL ESTATE COMMISSION—AUTHORITY TO
REQUIRE BOND TO ASSURE COMPLETION OF
SUBDIVISION IMPROVEMENTS—§§475.47-
475.55, F. S.

To: *Benjamin T. Shuman, General Counsel, Florida Real Estate
Commission, Winter Park*

QUESTIONS:

1. Does the Florida real estate commission have the authority under its rules and regulations adopted pursuant to Ch. 475, F.S., to require a bond, in an amount deemed by the commission to be adequate financial assurance for the completion of improvements in a subdivision, prior to approving advertising and promotional material of a development company?

2. If so, by what authority would the bond be enforced in the event of default by the principal?

Sections 475.47-475.55, F. S., relate to the publication of false and misleading information for the purpose of offering for sale any

real estate located in this state.

Section 475.52 places the enforcement of said §§475.47-475.55, F. S., in the commission and vests in it the authority to adopt reasonable rules and regulations as may be necessary for the enforcement of the aforesaid provisions.

It appears that pursuant to such rule-making authority the commission deemed it necessary to adopt certain rules and regulations, among which are "standards for approval" known as part III, §§A301.01-A301.04 of the rules and regulations of the commission. Such rules prescribe the criteria or standards that must be complied with before the commission will give its approval for the publication of any promotional or advertising material.

In addition to other things, the commission requires that if the advertising or promotional material should represent certain improvements which are not 75% completed, that such uncompleted improvements shall not constitute objection, if completion is assured by reason of posting with the commission of a good and sufficient bond or adequate reserves in moneys to be kept in a bank or trust company doing business in the state.

Replying to question 1, it appears that pursuant to the rules and regulations adopted by the commission that the commission has the authority to require compliance with the conditions enumerated in said rules as a prerequisite to giving its approval to any person, firm or corporation to publish or use any promotional or advertising material which may be deemed by the commission to be misleading.

Further replying to question 1, it appears that if a person, firm or corporation advertises that certain improvements will be made, the commission, under its rules, may require a sufficient bond to assure their completion.

Replying to question 2, it appears that the responsibility for enforcing the bond would rest upon the purchasers of property and who are damaged by a breach of the contract, inasmuch as the said bond assumes to guarantee completion of the specified improvements for the benefit of purchasers. It also appears that a copy of the agreement, sales contract, etc. should be attached to the bond and made a part thereof.

Great care should be taken by the commission to insure that the said bond will adequately protect purchasers and not lull them into becoming victims of fraud, misrepresentation and nonperformance.

I trust the foregoing information will be of some help to you.

061-69—May 2, 1961

TAXATION

DOCUMENTARY STAMP TAXES—SHARES OF STOCK
ISSUED IN ANOTHER STATE—§§608.03, 608.07, 608.09,
608.10, 608.13, 608.38, 608.39, 608.42, 201.01, 201.05, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Is corporate stock of a Florida corporation issued in another state and remaining beyond the boundaries of Florida subject to documentary stamp taxes?

We are here considering an original issue of corporate stock of a Florida corporation and not a mere transfer of stock. No question

is raised as to the lawful right of a Florida corporation, pursuant to a meeting of its stockholders and directors held in another state, to issue and deliver its stock in another state and to maintain stock books and records in another state (see §§608.03, 608.07, 608.09, 608.10, 608.13, and other sections of the Florida Statutes). Sections 201.01 and 201.05, F. S., impose a documentary stamp tax upon "each original issue, whether organization or reorganization, of certificates of stock issued in the state . . ." (Emphasis supplied.)

It is noted that §608.38, F. S., requires that every corporation existing and operating under and pursuant to Ch. 608, F. S., "shall maintain an office in this state with a resident agent thereat upon which process may be served," and keep the secretary of state informed of the current address of location of its said office and the name of its resident agent. Section 608.39, F. S., requires that every such corporation "keep at its office in this state, or in the office of its transfer agent wherever located, a book (or books where more than one kind, class or series of stock is outstanding) to be known as the stock book, containing the names, alphabetically arranged, with the address of every stockholder, showing the number of shares of each kind, class or series of stock held or recorded by him, and *where such stock book is kept in the office of a transfer agent, the corporation shall keep at its office in this state copies of the stock lists prepared from said stock book* and sent to it from time to time by said transfer agent. The stock book or stock lists shall show the current status; provided, if the transfer agent of the corporation be located elsewhere, a reasonable time shall be allowed for transit by mail." The said stock book is required to be open for inspection, under the limitations mentioned in the statute, or, if the stock book is kept outside of the state, a stock list in lieu thereof, prepared as above required, for like inspection. In other words, the statutes require that a record of the stockholders and the shares held by them be maintained in this state. The maintenance of such a record of stock and stockholders is mandatory upon the corporation. We must presume that such stock records are maintained in this state.

In *Gay v. Inter-County Tel. and Tel. Co., Fla.*, 60 So. 2d 22, the said telephone and telegraph company was organized under the laws of Florida around 1925, and attempted a reorganization, through a directors and a stockholders meeting held in *New York City* around Aug. 14, 1941, at which the time certain shares of stock were issued and delivered in connection with the reorganization. The state comptroller levied a tax, under §201.05, F. S., upon the issuance of these shares of stock. The telephone and telegraph company contended that "the corporation is not liable because the meetings and transactions took place in New York," and not within the state of Florida, as contemplated by §§201.01 and 201.05, F. S. The court replied that "the corporation is a domestic corporation organized under the laws of the state of Florida and is subject to such laws. Its physical assets are located in the state of Florida. In the case of *Bickell v. Lee*, comptroller of Florida, DC 5 Fed. Supp. 720, 721, in a court composed of Circuit Judge Bryan and District Judges Sheppard and Akerman, it was held: 'However, where a sale is made of stock of a Florida corporation and a transfer made upon the books of the corporation in Florida, the state may properly tax the transfer as one made within the state. See *People ex rel Hatch v. Reardon*, 110 App. Div. 821, 97 N. Y. S. 535.' This case found its way to the supreme court

of the U. S., *Lee v. Bickell*, 292 U. S. 415, 54 S. Ct. 727, 78 L. ed. 1337. The supreme court of the U. S. modified to some extent the decree of the 3-judge court but did not modify or change the above-quoted portion of the opinion."

In *State v. Gay, Fla.*, 90 So. 2d 132, text 135, the court made reference to the above-mentioned telephone and telegraph company case, stating that in said case it "held that when stock of a Florida corporation was transferred on the books of that corporation, it was necessary to pay the tax and affix the stamps to the stock books of the corporation at the time of noting the transfer on the corporate records. *The transfer of the stock was complete when the record of the transfer was made in Florida on the corporate stock book.*" Under §608.42, F. S., "no transfer of certificates of stock shall be valid against the corporation, its stockholders (other than the transferor) and its creditors for any purpose except to render the transferee liable for debts of the corporation to the extent provided by this chapter, until it shall have been registered upon the corporation's books." The stock lists above mentioned which may be maintained in this state in lieu of the stock book are in lieu of the stock book and constitute a record of stock holders in this state. It is in lieu of the stock book kept in another state. The purpose of the stock lists, like the stock books kept in the state, is to give notice of those who are stockholders of the corporation.

In view of the language of the court in *Gay v. Inter-County Tel. and Tel. Co.*, supra, as confirmed in *State v. Gay*, supra, we feel that the stock lists are in lieu of the stock books, when such stock books are kept in another state, and that the rule adopted in *Gay v. Inter-County Tel and Tel. Co.* should be applied. This being true, the above question should be answered in the affirmative.

061-70—May 5, 1961

TAXATION

SPECIAL BENEFIT ASSESSMENTS AGAINST REAL PROPERTY OF FLORIDA EDUCATIONAL TELEVISION

COMMISSION—CHS. 28948, 1953; 59-1142, LAWS OF FLORIDA; CH. 246, §§246.02, 246.05, 246.06, 246.08, 246.09, 246.14, 192.27, 235.34, 298.36, F. S.; §3, ART. XII, STATE CONST.

To: *Florida Educational Television Commission, Tallahassee*

QUESTION:

May the board of county commissioners of Broward county impose the special benefit assessments provided for and authorized by Ch. 28948, 1953, as amended by Ch. 59-1142, against property of the Florida educational television commission used in connection with the operation of its educational television program in the Dade, Broward and Palm Beach counties area of the state?

The Florida educational television commission was established by Ch. 57-312, brought into the Florida Statutes as Ch. 246, F. S., the purpose of the said statute being "to provide through educational television a means of extending the powers of teaching in public education and of raising living and educational standards of the citizens and residents of the state" (§246.02, F. S.). This commission operates under the control and supervision of the state

board of education (§246.05, F. S.), a constitutional board (§ 3, Art. XII, State Const.). This commission is made a body corporate (§246.06, F. S.). This commission is authorized and empowered to establish a television network connecting such communities and stations as may be designated by the state board of education. Said network is "to be utilized primarily for the instruction of students at existing and future colleges and universities, including community or junior colleges, of the state or as many thereof as may prove practical." (§246.08, F. S.).

Among other powers the commission, either on its own motion or with the consent of the state board of education, is given power to encourage "the activation of unused reserved educational television channels; the extension of educational television network facilities; the coordination of Florida's educational television system with those of other states; and the further development of educational television within the state." (§246.09, F. S.). Under §246.08, F. S., should the commission determine that, in lieu of leasing facilities from common carriers, it can more economically construct and maintain such transmission channels, it is authorized and empowered to design, construct, operate and maintain the same, including a television microwave network." (§246.08, F. S.). The provisions of said Ch. 246, F. S., are to be "liberally construed in order to effectively carry out the provisions" thereof in the interest of public education (§246.14, F. S.).

Under Ch. 28948, 1953, as amended by Ch. 59-1142, the board of county commissioners of Broward county may provide for the construction or improvement of streets, roads, curbs, gutters, drainage facilities and sidewalks "in any area of said county which is not within the limits of a municipality, and provide for the payment of all or any part of such improvement by levying and collecting special assessments from the abutting, adjoining, contiguous or other specially benefited property." After the improvements are completed, the board may by resolution "levy special assessments against the specially benefited property in proportion to the benefits to be derived from the improvement." Doubtless the Florida educational television commission is the owner of property abutting, adjoining, contiguous or adjacent to the improvements, which appears from the file to have been southwest 56th Ave., said property being described as lots 9 and 10 of Hollywood Ridge farms. For the purpose of this opinion only we shall presume that the improvement in question *specially benefited* the said property of the Florida educational television commission above described.

This brings us to the question of whether the said property of the said Florida educational television commission is within the purview of said Chs. 28948 and 59-1142, authorizing the "levying and collecting of special assessments from the abutting, adjoining, contiguous or other specially benefited property." Neither of the said acts expressly authorizes assessment of benefits against the state or its agencies. "The minority rule is that state property, unless it is expressly exempted, is subject to a special or local assessment. The majority rule, however, is that in the absence of legislative permission, state property is not subject to special assessment. A grant of the power to levy special assessments on state property is not to be implied from a statute giving a general power to make assessments to meet the cost of local improvements. The intent that the property of the state shall be subject to assessment must be clearly expressed. One reason advanced for the

rule, that if the statute authorizing special assessments is in general terms, neither excluding nor including specifically the property of the state, such statute is to be so construed as to exclude property of the state, is that it is a general rule in the interpretation of statutes limiting rights and interests to construe them so as not to embrace the sovereign power or government, unless the same is expressly named therein or intended by necessary implication. The rule has sometimes been put on the ground that the property of the state cannot be taken on execution. So, a constitutional provision whereby certain state lands are made inalienable has been said to preclude the levy of a local assessment thereon. A constitutional prohibition against suits against the state has been held to preclude the levy of a special assessment on its property. Still another reason advanced is that it is unreasonable to tax one governmental agency for the benefit of another." (48 Am. Jur. 641 and 642, section 87; see also Fla. 437, section 23.)

"The state and its agencies are not to be considered as within the purview of a statute, however general and comprehensive the language of such may be, unless an intention to include them is clearly manifest" (59 C. J. S. 1103, §653). The power of a municipality to "subject the property of the state to assessments of this character (special benefit assessments) does not exist in the absence of statutes conferring it, and the power must be conferred either expressly or by necessary implication" (63 C. J. S. 1067, §1332; see also annotation in 9 A.L.R. 1143). In this state the public property of a county has been held not liable for municipal special assessments in the absence of a statute providing therefor (Edwards v. Ocala, 58 Fla. 217, 50 So. 421; Alachua County v. Gainesville, 67 Fla. 506, 65 So. 653 and 69 Fla. 581, 68 So. 759; Blake v. Tampa, 115 Fla. 348, 156 So. 97). Section 192.27, F. S., does not seem to authorize the imposition of special benefit assessments against state property, but outlines the procedure to be followed when the imposition of such assessments is otherwise authorized. Specific provision was made in applicable statutes for the imposition of special benefit assessments of the Everglades drainage district against state lands (§1164, R. G. S., 1920; §§1534 and 1530(49) C. G. L., 1927 and 1936), the general drainage statutes (§298.36, F. S.) and in the flood control statutes (§378.30, F. S.). Like provisions have been inserted in most, if not all, of the special and local acts setting up drainage and similar districts.

We do not think that an educational television station may be construed as a school plant within the purview of §235.34, F. S. We have no evidence before us that the safety and health of students and others using the station, as contemplated by said §235.34, are here involved as would be the case of a school building used for housing students during school hours.

These observations answer the above question in the negative. Should the county refuse to cancel the said assessments it may be necessary for the commission to resort to court action.

061-71—May 5, 1961

TAXATION

HOMESTEAD TAX EXEMPTION—AGREEMENT FOR DEED—
ASSIGNMENT OF AGREEMENT—§§192.13, 697.01,
F. S.; §7, ART. X, STATE CONST.To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where a purchaser under an agreement for deed assigns his interest under said agreement to a third party as security for a loan, but continues to reside on the property described in said agreement in good faith making the same his permanent home, does he lose his eligibility for homestead tax exemption?

In equity "a binding and enforceable contract for the sale and purchase of real estate is recognized, for most purposes, as if it were specifically executed and performed. The purchaser thereunder has a valid and subsisting interest in the property that is the subject matter of the contract. As a general rule, he is regarded as the owner, or as the equitable owner, or as the beneficial owner; and the contract vests him with an equitable title to the realty ..." (91 C. J. S. 1009-1010, §106; see also *Felt v. Morse*, 80 Fla. 154, 85 So. 656, text 658; *Lafferty v. Detwiler*, 155 Fla. 95, 20 So. 2d 338, text 343; *Atlantic Beach Improvement Corp. v. Hall*, 143 Fla. 778, 197 So. 464, text 466). The title of a purchaser under an agreement for deed, who is put into possession of the property, holds a beneficial title in equity to real property within the purview of §7, Art. X, State Const. However, before a purchaser under such an agreement for deed may be granted homestead tax exemption, it is required by §192.13, F. S., that such contract for deed be placed of record in the office of the clerk of the circuit court of the county.

An assignment of the interest of a vendee under an agreement for deed, for the purpose of securing the payment of money, or even an assignment of the contract for deed itself for a like purpose, is in law the giving of a lien or mortgage encumbering the title of the vendee, and not a passing of the vendee's title. Such a transaction is no different from an owner of the legal title mortgaging his property. Even a deed of conveyance, when given for the purpose of securing the payment of money, has been held to be in law a mortgage lien only. (§697.01, F. S.; 22 Fla. Jur. 186, et seq., §§72-77).

Under these authorities the above stated question is answered in the negative, provided the agreement for deed (not the assignment to secure the payment of money) is of record, as required by §192.13, F. S.

061-72—May 5, 1961

RETIREMENT
STATE AND COUNTY OFFICERS AND EMPLOYEES—
ENFORCEMENT OF SOCIAL SECURITY CON-
TRIBUTION PROVISION—§§122.13, 122.21,
122.24-122.26, 122.33, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

What procedures are available, if any, for enforcing unpaid social security contributions of state and county employees within the purview of §§122.21-122.33, F.S., relating to the state and county officers and employees retirement system?

Members of the state and county officers and employees retirement system of this state under its division "B" (§§122.21-122.33, F. S.), upon becoming such members become liable for salary contributions therein provided and required by said sections of the said statutes. These statutes require that "the officer or board paying the salary of a member of this division shall withhold from such salary: Four per cent of such salary, which shall constitute the contribution of the member to this system with respect to retirement and other benefits payable under this system. The officer or board so withholding such percentage of salary shall without delay deposit the same *in the state and county officers and employees retirement fund.*" In addition to the above four per cent contribution, the said officer or board is further required to withhold from said salary "the percentage of such salary which shall constitute the contribution of the member required for social security coverage as now or hereafter fixed by relevant federal statutes. The officer or board so withholding such percentage of salary shall deposit the same without delay *in the retirement social security fund.*"

Section 122.26, F. S., creates "in the state treasury a fund to be known as *the retirement social security fund*, into which shall be deposited the contributions required of members for social security coverage, and such amounts as may be appropriated by the state for that purpose." The administrator of said division "B" shall "*maintain separate accounts for each member of this division; and shall maintain said accounts in such manner, form and detail as shall meet the requirements of the federal social security act and regulations in relation to the social security of such member.*" The administrator shall from time to time make such reports as may be required by relevant federal laws and regulations relating to social security coverage of the members of this system." Sections 122.01, 122.23, 122.24 and 122.25, F. S., evidences an intention on the part of the legislature to enforce the payment of the contributions by employing officers, boards and agencies, due for social security payments, and the payment thereof into the retirement social security fund. The obligation of the employer to collect such contributions by deductions from wages due, and of the employee to pay the same, are continuing duties. The failure of the official charged with the making of the said deductions from salaries would seem to be a violation of the statutes and a neglect of official duties. The contribution to be withheld and paid into the retirement social security fund is in the nature of a federal imposition to be

collected by state and local officers and agents for the use and benefit of the social security fund. Such impositions when collected by public officers, boards, etc., are in the nature of trust funds, for the specific purpose of being transmitted to the said social security fund.

The impositions imposed by the federal government in connection with the administration and enforcement of the federal social security program, are in the nature of excise taxes (see 48 Am. Jur. 516, §4, 81 C.J.S. 75; U. S. v. New York, 315 U. S. 510, 62 S. Ct. 712, 86 L. ed. 998; *People v. U. S.*, 328 U. S. 8, 66 S. Ct. 841, 90 L. ed. 1049). The Florida Statutes make provision for the collection of these contributions, both for state retirement and federal social security, by deducting the same from wages and compensation payable to the member or employee. It is the continuing duty of the employing official, board or agency to withhold from the wages of the member and employee the deductions necessary to pay both the state retirement and social security contributions. The state, through agreement with the federal government has brought those members of the retirement system so desiring within the purview of federal social security. Under federal statutes an employer failing to make the required deductions becomes liable therefor and may be proceeded against for the collection of the same. Any officer, board or agency failing to make the required deductions from their employees fails to comply with the requirements of Ch. 122, F. S., and may be guilty of a breach of duty and a violation of the requirements of said Ch. 122, F. S. Where an officer, board or agency required to make such deductions fails to do so or fails to deduct the correct amount, he is authorized and obligated to make such deductions from future salaries or compensation; the obligation to make such deductions being a continuing duty. The state comptroller would seem to have the authority to deduct amounts due for such contributions from any moneys due the member from the state, and a similar authority would seem to rest in county and local officers, boards and agencies.

Under §122.13, F. S., by and with the consent and approval of the state budget commission, the comptroller may make such regulations as are necessary for the effective administration of Ch. 122, F. S. This authority seems to extend to necessary rules and regulations deemed necessary to insure the compliance with the statutes requiring the above deductions from wages and compensation. The deductions are authorized under the statutes and the budget laws and proceedings setting the budget for the payment of the salary of the employee. However, it is doubted that such shortage, when the employee has been paid in full, may be assessed against the budgetary account of the employing officer, board or agency, or the withholding tax deductions account, as the latter fund seems to be in the nature of a trust fund under federal statutes and laws. It might be possible to charge the deduction against the employees contributions account when he refuses to make up the deficiency in his social security account, although this may create a deficiency to be made up before retirement. If this procedure is to be followed we suggest that a general rule or regulation to that effect be adopted under §122.13, F. S.

The above seems to answer your question as well as it may be answered under existing statutes.

061-73—May 11, 1961

TRADE AND COMMERCE
CONDITIONAL SALES CONTRACT—SALE UNDER POWER
OF ATTORNEY UPON DEFAULT, VALIDITY—
§§55.05 AND 516.16, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

May the purchaser of tangible personal property under a conditional sales contract by power of attorney authorize the seller, or his assignee, upon default in making the required payments under the said contract, to sell and transfer the said property for the account of the said seller or his assignee?

A conditional sales contract, sometimes referred to as a retain little contract, is one in which the vendee receives the possession and right of use of the goods sold, but transfer of title is made dependent on the performance of some condition or the happening of some contingency, usually the full payment of the purchase price (Cox Motor Co. v. Faber, Fla. App., 113 So. 2d 771, text 774; Edwards v. Baldwin Piano Co., 79 Fla. 143, 83 So. 915, text 917 and 918; Mizell Livestock Co. v. J. J. McCaskill Co., 59 Fla. 322, 51 So. 547, text 550; annotations in 17 A. L. R. 1421, 43 A. L. R. 1247, 92 A. L. R. 304, 175 A. L. R. 1366). On breach of a conditional sales or retained title agreement by the vendee, the vendor has the option of (1) asserting his title by repossessing the property, (2) recognizing title in the vendee and bringing an action for the unpaid portion of the purchase price, or (3) claiming an equitable lien on the vendee's interest in the property and foreclosing it (Malone v. Meres, 91 Fla. 709, 109 So. 677, text 693; 6 Fla. Jur. 157, §116; 78 C. J. S. 344, et seq., §§597, et seq.).

"Our decisions are clear to the effect that, in a conditional sale, the seller cannot sue the purchaser on the debt and retain his title to, and right to take back the possession of, the property; nor can he take back the property and then sue to recover the debt; nor has he the power to grant to another any right to pursue these inconsistent remedies," at least in the absence of a statute so providing (Voges v. Ward, 98 Fla. 304, 123 So. 785, text 793; see also Jackson v. S. H. Wade Mfg. Co., 102 Fla. 970, 136 So. 689, text 690; 6 Fla. Jur. 161, §120). A conditional sales contract may be assigned, and when assigned the assignee succeeds to the rights of the vendor, including the remedies of the vendor above mentioned (6 Fla. Jur. 152-154, §§112 and 113).

The above stated question contemplates a power of attorney from the buyer to the seller authorizing the seller, upon the default of the buyer to sell and transfer title to the property, evidently as a means for enforcing the obligation of the buyer to the seller for any part of the purchase price in default. Under §55.05, F. S., "all powers of attorney for confessing or suffering judgment to pass by default or otherwise, and all general releases of error, made or to be made by any person whatsoever within this state, before such action is brought, shall be absolutely null and void." Under this section any power of attorney to the seller, by the purchaser, for use in connection with any action in replevin to recover possession of the property, or any action on the unpaid purchase price or in connection with an action in foreclosure

would be void. *Wylly-Gabbett Co. v. Williams*, 53 Fla. 872, 42 So. 910, text 929, involved a mortgage containing a provision empowering the mortgagee, upon default of the mortgagor, to take possession of the mortgaged property, sell the same and apply the proceeds of the sale to the mortgage indebtedness; the court remarked that "this provision in the mortgage is *nugatory*, but does not vitiate the mortgage and should be disregarded." (Emphasis supplied.) This same rule appears to have been applied in *Mitchell v. Mason*, 65 Fla. 208, 61 So. 579, text 589. The rule above stated appears to have been made a rule of statute by §516.16, F. S., as to the small loan business.

These authorities answer the above question in the negative in the absence of a statute expressly authorizing such a sale under such a power of attorney.

061-74—May 11, 1961

TAXATION

BOMB AND SIMILAR SHELTERS—AD VALOREM TAXATION—§192.02, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are bomb and similar shelters, some being above ground and some below ground level, subject to ad valorem taxes?

Not being fully advised of the exact nature and construction of the bomb and similar shelters in question, we shall presume that they are of brick, block, concrete or similar construction, permanent in nature attached to the land, whether constructed above or below ground level, so as to become a part thereof, and not temporary in nature, so that they become part and parcel of the lands upon or in which constructed (see 27 Am. Jur. 261, §3). For the purposes of taxation, real property includes not only the land itself but also "all buildings, fixtures and other improvements thereon." (§192.02, F. S.). Doubtless the bomb and similar shelters contemplated by your request for opinion are such as would be deemed "buildings, fixtures or other improvements" within the purview of said §192.02, F. S., and such as become a part of the land upon or within which constructed.

Such shelters, like other buildings, fixtures or other improvements within the purview of said §192.02, are to be taken into consideration when fixing the value of real estate for purposes of taxation. Whether or not a parcel of real estate upon or within which bomb and similar shelters are constructed is enhanced in value is a question of fact to be determined in the first instance by the tax assessor.

Bomb and similar shelters, whether constructed above or below ground level would, at least in most instances, become a part of the real estate upon or within which constructed and should be taken into consideration when fixing the value of the property for purposes of taxation. Whether or not such shelters increase the value of the lands, and in what amount, if any, is a question of fact to be determined by the tax assessor in the first instance.

061-75—May 12, 1961

**COUNTY SCHOOL SYSTEM
PERSONNEL CONTINUING CONTRACTS—ELIGIBILITY OF
PERSON WHOSE CONTRACT READS "TEACHER-
PRINCIPAL"—§231.36, F. S.**

To: *Thomas D. Bailey, State Superintendent of Public Instruction,
Tallahassee*

QUESTION:

May a school board legally issue continuing contracts to principals who have no teaching duties, who have completed their probationary service as principals, but whose contracts read "teacher-principal"?

Section 231.36, F. S., provides, in part:

... Effective July 1, 1951, each member of the instructional and administrative staff in each county school system, except in counties operating under local, special or general tenure laws with stated population application, who holds a regular certificate based at least on graduation from a standard four year college, who has completed three years of service in a county of the state and who has been reappointed in such county for the fourth successive year, shall be entitled to and shall be issued a continuing contract in such form as may be prescribed by regulations of the state board; provided, that the period of service provided herein may be extended to four years when prescribed by the county board and agreed to in writing by the employee. Each person to whom a continuing contract has been issued as provided herein *shall be entitled to continue in his position or in a similar position in the county at the salary schedule authorized by the county board without the necessity for annual nomination or reappointment until such time as the position is discontinued, the person resigns or until his contractual status is changed as prescribed below:* (Emphasis supplied.)

Principals are included in the term "instructional staff." (§231.36(3), F. S.). The apparent intent of the language quoted above in the continuing contract act is to provide a three or four year probationary period during which the competency of the individual may be observed by the county superintendent and school board in the position held, whether it is that of teacher or principal before granting tenure to the individual "in his position or in a similar position."

It is apparent that the position of principal is administrative in nature and not similar to a teaching job even though both teachers and principals are generally classified as instructional personnel.

It is possible that a good principal might not prove to be a good teacher and the opposite might also be true.

According to the facts outlined in your question, the board has had no opportunity to observe the individual's competency as a teacher since he has served solely as a principal.

It is my opinion, therefore, that §231.36, F. S., quoted above would not under these circumstances authorize a continuing contract to be issued as a teacher but would authorize a continuing contract to the individual which would protect him in his employ-

ment as a principal or in a similar position as principal of another school.

Your question, subject to the factual situation presented, is answered in the negative.

061-76—May 12, 1961

TAXATION

TAX EXEMPTION—FOUNDATION ESTABLISHED FOR RELIGIOUS, EDUCATIONAL AND CHARITABLE PURPOSES—

§1, ART IX, §16, ART. XVI, STATE CONST.—§192.06, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

When are foundations established for religious, educational and charitable purposes entitled to tax exemption in this state?

The foundation in question was established by an individual residing in this state, with one of the national banks in this state as trustee of the properties of the foundation. The declaration of trust by the donor states that he "is an elderly person and desires to relieve himself of the care and management of certain of his property and to devote the same to religious, educational and charitable uses and purposes and desires to establish a trust for the proper administration and distribution thereof." In this connection, the donor transferred to the said trustee intangible personal property having considerable monetary value, which trusteeship and funds were accepted by the trustee for the purposes mentioned. The trust does not seem to be confined to intangible property and may consist of both real and personal property. The trust seems to be designed for perpetual existence. The powers of the trustee over the trust property are broad and extensive.

The purpose, as expressed in the trust agreement, is to establish a nonprofit religious, educational and charitable trust and to use the principal and income of the trust, as may be authorized from time to time by a board of foundation managers, established by the donor, for such educational, religious, charitable and scientific uses and purposes as may be appointed, ordered or directed by the said board of managers. It is the function of the said board of managers "to determine to whom and in what amount and at what times and under what conditions contributions of interest and principal shall be made in furtherance of the purposes of this trust. Accordingly, it shall be the duty of the board of managers to direct the trustee in the distribution of the trust property, both of income and of principal." No part of the foundation funds may be used except for religious, educational and charitable purposes, or for one or more of such purposes.

Under §1, Art. IX, and §16, Art. XVI, State Const., and §192.06, F. S., only such property as is "*held and used exclusively* for religious, scientific, municipal, educational, literary, or charitable purposes," may be granted exemption from ad valorem taxation. The right to tax exemption is determined by the use the property is put to and not by the character of its owner (*State v. Doss*, 150 Fla. 486, 8 So. 2d 15, text 16; *Lummus v. Florida Adirondack School*, 123 Fla. 832, 168 So. 232, text 238; *University Club v. Lanier*, 119 Fla. 146, 161 So. 78, text 79; *Dr. William Howard Hay Foundation v. Wilcox*, 156 Fla. 704, 24 So. 2d 237).

The purposes of the foundation are clearly for educational, religious, charitable and scientific uses. The property, under the trust instruments, is clearly held for educational, religious, charitable and scientific purposes; however, the primary test of tax exemption is use and actual application for the purposes mentioned in the constitutional and statutory provisions first above mentioned in this paragraph. To be entitled to tax exemption, the property of the foundation must be used for one or more of said purposes and for no other purpose or purposes.

Whether or not the property of a foundation or other charity and the income therefrom are committed to and are being used for educational, religious, charitable or scientific purposes, or for a combination of such purposes, so as to be entitled to tax exemption under §1, Art. IX, and §16, Art. XVI, State Const., and §192.06, F. S., is a question of fact to be determined by the county assessor of taxes in the first instance from the evidence and proofs furnished him by the person, firm or corporation claiming the tax exemption and such evidence and proofs as he may gather and ascertain himself in the same connection. Where property held by a trustee or foundation is claimed by such trustee or foundation to be entitled to tax exemption, it is the obligation of the one claiming the property and the income therefrom to be tax exempt to furnish proof that such property and any income therefrom are being held and used exclusively for one or more of the purposes mentioned in the above mentioned constitutional and statutory provisions.

These observations furnish the formula for answering the above stated question.

061-77—May 12, 1961

TAXATION

DOCUMENTARY STAMP TAXES REQUIRED ON CONVEYANCE SUBJECT TO AN OUTSTANDING MORTGAGE OR OTHER LIEN WITHOUT GRANTOR ASSUMING OR AGREEING TO PAY SAID MORTGAGE OR LIEN— §§201.01, 201.02, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

What is the measure of documentary stamp taxes under §201.02, F.S., where a parcel of real property is sold and conveyed subject to an outstanding mortgage or other lien encumbering it, without the grantee assuming and agreeing to pay the said mortgage or lien?

Section 201.01, F. S., imposes a documentary stamp tax on certain documents, bonds, debentures or certificates of stock and indebtedness, and other documents, instruments, matters, writings and things described in subsequent sections of Ch. 201, F. S. Under §201.02 of said statutes the said tax is imposed on "deeds, instruments, or writings, whereby any lands, tenements, or other realty, or any interest therein, shall be granted, assigned, transferred or otherwise conveyed to or vested in the purchaser, or any other person by his direction. . . ." The amount of the tax imposed "on each one hundred dollars of the consideration therefor the tax shall be twenty cents; . . ." This tax is imposed upon the actual consideration paid for the property conveyed, whether mentioned

in the instrument by which the conveyance is made or not. This Florida statute differs from §4361, title 26, of the U. S. code, upon the same subject, where the amount of the federal stamp tax on conveyances is measured by "the consideration or value of the interest or property conveyed, *exclusive of the value of any lien or encumbrance remaining thereon at the time of sale, . . .*" (Emphasis supplied.) The Florida statute was derived from Ch. 15787, 1931, and the federal statute from the federal revenue act of 1924; an examination of these acts shows that the statutes differed as above when the Florida act was enacted in 1931, and that the difference has continued since their original enactment.

Although the Florida statute was taken largely from the federal statute and takes the same construction as is given the federal statute in the federal court, except in so far as the Florida statute differs from the federal one (*Gay v. Inter-County Tel. and Tel. Co.*, Fla. 60 So. 2d 22; *State ex rel Packard v. Cook*, 108 Fla. 157, 146 So. 223), the fact that the legislature of Florida deviated materially from the federal statute, when it enacted Ch. 15787, 1931, now appearing, with amendments, as §201.02, F. S., having deleted the provision of the federal statute excluding the value of mortgages and liens encumbering the property sold and conveyed when determining the amount of the federal tax, thereby indicating an intention of including such value of mortgages and liens when calculating the state tax, indicates an intention on the part of the Florida legislature not to follow the federal statute in this connection. It is evident from the above and foregoing that the method of determining the federal tax and of determining the Florida tax differs materially.

This brings us to the question of the legal and equitable obligation of a grantee who purchases real property subject to a mortgage or lien encumbering the said property, but who does not assume and agree to pay the said mortgage or lien. The mere statement in a deed of conveyance that the real property conveyed by it is conveyed subject to an existing mortgage does not make the grantee personally liable for the payment of such mortgage (*Alabama-Florida Co. v. Mays*, 111 Fla. 100, 149 So. 61; *Fort Pierce Bank and Trust Co. v. Smith*, 108 Fla. 313, 146 So. 225, text 227). A different situation arises when the grantee assumes and agrees to pay an existing mortgage. "It may be assumed to be settled in this state that when a deed contains a covenant by the grantee assuming and agreeing to pay a mortgage on the land, and the deed is accepted by him, he obligates himself to pay the mortgage debt as conclusively as if he had signed a written agreement to that effect, as a part of the consideration to be paid for the lands conveyed." (*Ackley v. Noggle*, 97 Fla. 640, 121 So. 882, text 883). "It is not necessary that the assumption agreement be incorporated in the deed of conveyance where the debt assumed represents a part of the consideration of purchase of the property concerned, or even that it should be in writing; a parol agreement by the grantee at the time of the taking of the deed being sufficient." (*Alabama-Florida Co. v. Mays*, *supra*; see also *Yates v. St. Johns Beach Devel. Co.*, 129 Fla. 411, 176 So. 422, text 423).

Although a grantee, taking a conveyance of real property subject to an existing mortgage encumbering it, does not assume and agree to pay the same, so as to become personally liable for the payment of the same, is the said mortgage indebtedness to be presumed to have been included in the purchase price for the purposes of determining the documentary stamp tax imposed by

§201.02, F. S.? This we feel to be the case. In 4 Pomeroy's Equity Juris., 5th Ed., 614, 615, §1205, it is stated that: "*A grantee who thus takes a conveyance subject to a mortgage is presumed to have included the mortgage debt in the purchase price, and is not, therefore, permitted to dispute the validity of the mortgage; . . .*" although he is not personally liable for the mortgage debt. By accepting the deed of conveyance, stating that it is made subject to a mortgage indebtedness, although he does not personally obligate himself to pay the mortgage, he makes the property purchased by him liable for the payment of the same (see 4 Pomeroy's Equity Juris., supra; Kay v. Castleberry, 99 Ark. 618, 139 S. W. 645, text 648; Fogarty v. Hunter, 83 Or. 183, 162 P. 964, text 971; Jones on Mortgages, 8th Ed., 937; Ann. in L.R.A. 1917C 832, et seq.). The above statement in Pomeroy's Equity Juris. has been cited with approval by the Florida courts.

The district court of appeal, 3rd district, in Zimmerman v. Hill, Fla. App., 100 So. 2d 432, stated that "the chancellor below relied upon Spinney v. Winter Park Building and Loan Association, 120 Fla. 453, 162 So. 899, on pp. 903, 904, wherein the court stated: ' . . . In Alabama-Florida Co. v. Mays, 111 Fla. 100, text 108, 149 So. 61, 64 (91 A.L.R. 139) and Id., 111 Fla. 783, 149 So. 661, we said: '*It is conceded that, where a grantee takes a conveyance subject to a mortgage, he will be presumed to have included the mortgage debt in the purchase price. . . .*'" In 59 C.J.S. 561, §397, under the title "Presumptions," the statement is made that: "It may be presumed that a purchaser subject to a mortgage bought the land at its value, less the amount of the indebtedness secured by the mortgage, and that he included the mortgage debt in the purchase price. Also, where a conveyance subject to a mortgage states a nominal consideration, the mortgage debt will be presumed to have been included in the purchase price. The presumption may be overcome, as by evidence of an agreement to the contrary between the parties, but it has been held that it may not be overcome to the prejudice of third persons who may be thereby affected. The presumption does not arise where the purchaser paid the full amount agreed on for a clear title." In 37 Am. Jur. 381, §1102, it is stated that: "In the event of a conveyance of mortgaged property subject to the mortgage, it is generally presumed that the amount of the mortgage has been deducted from and is a part of the purchase price. It is consequently frequently asserted that mortgaged property transferred subject to the mortgage is the primary source for the satisfaction of the mortgage. The ordinary significance of this statement is that as between the parties to the transfer, and to the extent of the grantee's interest in the property, the grantee is a principal and the grantor a surety."

From the above and foregoing, especially in the light of Zimmerman v. Hill, Spinney v. Winter Park Bldg. and Loan Ass'n, and Alabama-Florida Co. v. Mays, a grantee taking a conveyance of real property subject to an outstanding mortgage is presumed to have included the mortgage debt as a part of the purchase price so that, although there is no assumption of the mortgage debt as a personal obligation, the purchaser's interest in the lands conveyed becomes obligated for the payment of the said mortgage. Therefore, the amount of a mortgage encumbering the lands purchased, subject to which the conveyance is made and which was not personally assumed by the said grantee, is presumed to have become a part of the consideration for the conveyance within

the purview of §201.02, F. S. The purchase of real property subject to a mortgage encumbering the same, but which mortgage the grantee does not assume and agree to pay, is not in law the purchase of the equity of redemption of a mortgagor. In *Pierson v. Bill*, 138 Fla. 104, 189 So. 679, text 683, a deed of conveyance contained a limiting provision that "it is mutually understood and agreed that the grantee herein expressly neither assumes nor agrees to pay the above described mortgages, taxes and assessments; it being the intention of both parties to this conveyance that the grantee herein is simply purchasing the equity of the grantee (grantor) herein in the above described real and personal property." The court, after discussing briefly the meaning of "equity" and "equity of redemption," stated that: "In this state, the mortgagor retains the property subject to the lien, so technically the concept 'equity' or 'equity of redemption' is unknown to our law. In its common acceptation, it has reference to the value of the property in excess of encumbrances that amount to a lien and that was the sense in which it was employed in the deed brought in question." Notwithstanding, the language in the deed above quoted the deed was held to be a bargain and sale deed, and not a conveyance of an equity of redemption, if such exists under the laws of this state.

The measure of documentary stamp taxes under §201.02, F. S., under the facts posed by the above stated question, is the consideration paid for the conveyance, which must be presumed to include any mortgage, lien or encumbrance to which the conveyance is made subject. Although doubt is cast, by the above language quoted from *Pierson v. Bill*, of a mortgagor being vested with a technical equity of redemption subject to a transfer by him, we do not here finally dispose of that question. We here go no further than to hold that a conveyance of real property subject to existing mortgages, liens and other encumbrances, expressly conveyed as being subject thereto, but without the vendee expressly and agreeing to pay the same and making himself personally liable for the payment thereof, is not a conveyance of an equity of redemption and that the amount of the mortgage, lien or encumbrance mentioned is presumed to be a part of the purchase price.

In so far as the opinions of this office of Aug. 13, 1945 (045-251; 1945-6 AGO 337) and of Nov. 25, 1959 (059-242; 1959-60 AGO 378) conflict with this opinion, they are overruled. Where there is an assumption and agreement to pay mortgages, liens and encumbrances encumbering property conveyed, made after the execution, delivery or recording of the deed of conveyance, to which the grantor was not a party, it should be noted that such agreement would be a separate transaction and would amount to a written obligation to pay money under §201.08, F. S. This would seem to tend to confirm the presumption mentioned in *Zimmerman v. Hill*, *Spinney v. Winter Park Bldg. and Loan Ass'n* and *Alabama-Florida Co. v. Mays*, supra.

061-78—May 17, 1961

TRADING STAMPS

CONSTRUCTION OF §§559.04 AND 559.05, F. S., IN CONNECTION WITH BOND REQUIRED TO BE FURNISHED BY TRADING STAMP COMPANIES

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Where the bond of a trading stamp company, filed pursuant to §559.04, F.S., expires between the giving of the 90-day notice provided by §559.05, F.S., and the running of the said 90 days, should a new bond be required for the remainder of said 90 days?

The purpose of the bond required by §559.04, F. S., is to provide a source of funds to insure "the performance by the company of its obligation to redeem trading stamps issued (for it) by retailers in this state, when they are duly presented for redemption by the rightful holders." This bond is required to "be filed with the comptroller on or before July 1, 1959, and annually thereafter on or before July 1 of each year." From these statutory provisions it appears that a new bond is required each July 1 and that "on the effective date of each such new bond any and all liability on all bonds previously filed hereunder shall terminate, and all rightful holders of trading stamps who shall prosecute their claims hereunder shall prosecute such claims solely against the new bond and only by filing proofs of claim with the comptroller in the manner herein provided." (§559.04, F. S.). These statutory provisions require bond security for the redemption of trading stamps from the time of their issuance until they have been redeemed or the 90-day period mentioned in §559.05, F. S., has run.

Said §559.05, provides that "No trading stamp company shall cease or suspend the redemption of trading stamps in this state without filing with the comptroller at least 90 days' prior written notice of its intention to do so and concurrently mailing a copy of such notice to each retailer within the state which has at any time theretofore within one year issued trading stamps which the company is obligated to redeem." Doubtless this section contemplates the filing with the comptroller with proof of the mailing of copies of the notices aforesaid to the retailers mentioned, so that the comptroller will be fully advised as to such fact.

The 90-day period for redemption of stamps appears to be in the nature of a statute of limitation or non-claim, so that unless stamps are presented for redemption within said period of time there is no further obligation of the stamp company to redeem such stamps; provided that §559.05, is complied with.

Under the facts recited in the above stated question, it is answered in the affirmative. It would seem that the bond would not be required after the termination of the 90-day period, so that a bond extending beyond said 90 day period may be cancelled for the remainder of the term for which written when extending beyond said 90-day period, or a bond merely for said remainder of the 90-day period will suffice.

061-79—May 17, 1961

TAXATION

TAXATION OF TANGIBLE PERSONAL PROPERTY ON SANTA ROSA ISLAND, ESCAMBIA COUNTY—CH. 200, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Is tangible personal property located on Santa Rosa island, in Escambia county, not belonging to either Escambia county or the Santa Rosa island authority, subject to taxation under Ch. 200, F.S.?

This question does not contemplate leasehold interests in real or tangible personal property granted by either Escambia county or the Santa Rosa island authority, as was involved in *Park-N-Shop, Inc., v. Sparkman*, Fla., 99 So. 2d 571; *Patrick Gardens, Inc., v. Nash*, Fla., 100 So. 2d 626; and *Illinois Grain Corp. v. Schleman*, Fla. App., 114 So. 2d 307, but tangible personal property, title to which is vested in lessees of the county or the authority, or private tangible personal property otherwise on that part of Santa Rosa island within the jurisdiction of the Santa Rosa island authority. The above question involves tangible personal property located on those lands conveyed, on Jan. 15, 1947, by the U. S. to Escambia county, comprising some 4800 acres, more or less, situate on Santa Rosa island in Escambia county. There was included in the said conveyance a provision that the county shall retain and always use the said lands "as it shall deem to be in the *public interest* or be leased by it from time to time, in whole or in part, to such persons and for such purposes as shall be deemed in the *public interest*." Chapter 24500, 1947, authorized the purchase of said lands by Escambia county to be maintained and operated, "either itself or by contract or lease with individuals, firms or corporations," for specified purposes set out in §2 of said Ch. 24500. Bonds issued by Escambia county for the purpose of carrying out the purposes and intent of said Ch. 24500, 1947, were validated by the supreme court in *State v. Escambia County*, Fla., 52 So. 2d 125, as obligations of the Santa Rosa island authority.

Title to the said lands appears to have passed out of the U. S. into the county of Escambia for the purposes of being maintained for *public purposes*. The authority has leased portions of its lands and facilities to business firms to be operated by them as business facilities. Naturally, such businesses come into direct competition with like businesses in the county and in municipalities of the county. However, the taxability of such businesses on said Santa Rosa island is not dependent upon competition. Under §2, chapter 25810, acts of 1949, "all of the real and personal property owned, controlled or used by Escambia county, Florida, or Santa Rosa island authority, under or by virtue of said Ch. 24500, 1947, or for any of the purposes thereof, *including real and personal property rented or leased to others* by said county or said Santa Rosa island authority, shall be exempt from state, county, municipal and all other ad valorem taxes of every kind."

Only real and personal property owned by the county or the said authority is exempted by said Ch. 25810, 1949, not personal property of others located upon the said lands. Personal property leased by the county or authority to persons, firms or corporations transacting business upon the said lands appears to be with-

in the purview of the tax exemption provided by said Ch. 25810, 1949. However, "unless expressly exempted from taxation, all real and personal property belonging to persons residing in this state, shall be subject to taxation in the manner provided by law." (§192.01, F. S.). The tax exemption granted by said Ch. 25810, 1949, being limited to property owned by the county or authority, does not even purport to grant tax exemption to tangible personal property owned by lessees from the county or authority and located upon the above mentioned lands.

From the above and foregoing, it seems that the tax assessor of Escambia county may impose tangible personal property taxes against the personal property of business firms, including their stocks of merchandise, furniture and fixtures, leasing or otherwise acquiring space from the county or the authority above mentioned, where such property is owned by such business firms and not by the county or authority.

The above answers said question in the affirmative.

061-80—May 17, 1961

COUNTY SCHOOL SYSTEM
PROHIBITION AGAINST EMPLOYING MEMBER OF COUNTY
BOARD OF PUBLIC INSTRUCTION AS TEACHER—
§230.23 (9) (i), F. S.

To: *James N. Beck, Representative, Putnam County, Tallahassee*
QUESTION:

May a county school board member be employed by the board as a teacher?

Section 230.23 (9) (i), F. S., relating to powers and duties of the county board, says, in part: "Contract for ... services needed for the county school system, *provided, that no contract for supplying these needs shall be made with any member of the county board...*" (Emphasis supplied.)

In my opinion it would be against public policy for a school board member to be employed as a teacher by the board on which he holds office.

Such action would result in effect in the same individual employing himself and might logically create a conflict of interest in establishing contractual relationships with the teacher or if the board should be called upon to take disciplinary action against the teacher who is serving in the dual capacity as his own employer as a member of the board.

Your question is answered in the negative.

061-81—May 17, 1961

GAMBLING
RADIO STATION MATCH BOOKS CONTEST AS CONSTITUTING A LOTTERY IN FLORIDA

To: *Richard E. Gerstein, State Attorney, 11th Judicial Circuit, Miami*

STATEMENT OF FACTS:

Match books would be distributed to the public free through retail establishments such as cigar counters, grocery stores, cigarette machines, etc., and through special distribution points to be operated by a radio station. The

match books would have imprinted thereon a number. At various intervals during the week, the radio station conducting the contest would announce money match numbers. If a listener could present a match book which contained a number matching all or a part of the money match number in the proper order, then such listener would win a money prize which would vary, depending upon how many numbers the match book contained which were in the same order as the money number.

QUESTION:

Would the conduct of the contest as set forth in the foregoing statement of facts constitute violation of the lottery laws of this state?

There are three elements in a lottery, viz: a prize, an award by chance and a consideration.

It is apparent that the elements of prize and award by chance are present in this contest.

The term consideration as it is used in lotteries means something of value. This would, of course, mean that money or other property of value, or anything which would constitute a benefit to the promisor or a detriment to the promisee, would be more than adequate to furnish the element of consideration for a lottery.

It is believed that when this contest is compared with that considered by the supreme court of Florida in the case of Little River Theatre Corp. v. State, 185 So. 855, that the existence of the element of consideration is clear. Here, as in the Little River case, the radio station is not engaged in any philanthropic endeavor designed to enrich the members of the general public. Rather, the purpose of such radio station is to advertise its facility and to increase its use by the members of the listening and advertising public. Moreover, many of the persons participating in the contest will suffer a detriment in that they will make special trips to business establishments or other distributing points in order to procure the numbered match books and in doing so, will expend time, suffer inconvenience, and in some instances, incur travel expenses. The persons participating in this contest also suffer a detriment in that they are induced to listen to a particular radio station so that they might participate in such a contest rather than to pick the radio station they will listen to based upon its entertainment value and programming. Furthermore, the sponsoring station would receive a benefit in that it would expect that its listening public would be increased during the time that the contest is conducted thereby enabling it to more readily sell its advertising facilities to merchants in the area.

The statement which you furnished as to the format of this contest was silent on the question of whether the contest would be in any way underwritten by or coordinated with advertising programs of merchants who might be advertising through the sponsoring station. Should such be the case, however, then the element of consideration would be present for the additional reasons set forth in AGO 054-213 and AGO 057-60.

In view of the above, I am of the opinion that the money match book contest constitutes a lottery under the laws of this state.

061-82—May 18, 1961

MOTOR VEHICLES

LICENSES—INAPPLICABILITY OF §320.081, F. S., TO LARGE HOUSE TRAILERS ATTACHED TO REAL ESTATE—
 §320.01, F. S., §13, ART. IX, §1, ART. IX AND §16,
 ART. XVI, STATE CONST.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Are large trailer type semi-permanent housing facilities attached to rented or leased real property and used as living quarters within the purview of §320.081, F.S.?

In fact, we are here concerned with two trailer type facilities, one being around 42 feet in length and 10 feet in width, divided into what appears to be a bedroom about 16 x 10 feet, a living room area of about the same size, and a kitchen area about 9 x 10 feet, and the other about 28.5 feet in length and 10 feet in width, divided into what appears to be a bedroom about 16 x 10 feet, and another room about 10 x 12 feet, both having a total area of about 700 square feet. There appears to be a bathroom in each of the said trailers, and a kitchen sink doubtless connected to plumbing. We gather from the file that although both so-called trailers are brought to the location where installed on wheels and running gear, such wheels and running gear are not sold with the facilities, but will be furnished for the purpose of moving from place to place. The said trailers are now located in a trailer park in one of the counties of Florida and will remain there until the owner elects to move them to another location where they will be again set up in like manner. It seems quite evident from the factual situation before us that the primary purpose of the trailers in question is living accommodations and not the transportation of persons and property.

Section 320.081, F. S., applies "only to trailers and vehicles not self-propelled used for housing accommodations," and imposes an annual license fee to be paid "by said owners and operators of house trailers in this state," of \$10 for each trailer, the same being payable to the motor vehicle commissioner of Florida "at the same time and in the same manner as provided for other motor vehicle licenses. This license tax shall be in lieu of all other taxes, and a suitable license plate shall be issued to evidence the payment thereof." This section seems to presume that such trailers used for housing accommodations are motor vehicles within the purview and intention of §13, Art. IX, State Const., which section provides that "motor vehicles, as property, shall be subject to only one form of taxation which shall be a license tax for the operation of such motor vehicles . . . and shall be in lieu of all ad valorem taxes assessable against motor vehicles as personal property." In *Wood v. Club Trans. Serv.*, 149 Fla. 449, 196 So. 843, the trailer, referred to as a aerocar, was held to be a motor vehicle, within the purview of §13, Art. IX, State Const., because of its use purely auxiliary to a motor vehicle for the purpose of increasing its capacity for passengers and baggage without meanwhile increasing the motive power.

When §13, Art. IX, State Const., was adopted in 1930, trailers and semi-trailers were defined by the motor vehicle licensing statutes as including two and four wheel vehicles coupled to or drawn

by a motor vehicle (§1280, C. G. L., 1927). The same section of the statutes defined motor vehicles as vehicles operated over the public highways and streets of the state and propelled by power other than muscular power. Definitions of said terms have remained substantially the same (§320.01, F. S.). Court definitions of a motor vehicle are summed up as follows, in 60 C. J. S. 109, §1, "a motor vehicle is a vehicle operated by a power developed within itself and used for the purpose of carrying passengers and materials, and generally includes all vehicles propelled by power other than muscular power, except traction engines and such motor vehicles as run only upon rails or tracks."

Trailers and semi-trailers are defined in 60 C. J. S. 118 and 119, §8, which general definitions are in line with the Florida statutory definitions of trailers and semi-trailers (§320.01, F. S.). In *Forbes v. Bushnell Steel Constr. Co., Fla.*, 76 So. 2d 268, it seems to have been held that the fact that a vehicle is self-propelled does not of that fact alone prove that the same is in fact a motor vehicle, stating that "if we affirm the decree brought here for review the rule will have been established that any equipment mounted on wheels equipped with pneumatic tires that is capable of being self-propelled on the highways by means of a gasoline engine is a motor vehicle, and therefore immune from ad valorem taxation under our laws, even though the equipment is designed exclusively for construction work and is used for this purpose. . . . While it is shown that the vehicles can be, and perhaps are, operated on the highways, the extent and nature of the operation on the highways and whether or not such operation is primary, or only incidental to the main and ordinary uses of the vehicles, is not shown by the record. . . ." This case seems to indicate that the primary and secondary uses of the vehicles are important in determining whether they are or are not motor vehicles under the constitution and laws.

We come to the question of the application of §320.081, F. S., to the trailers above described. Said §320.081 purports to classify as motor vehicles, within the purview of §13, Art. IX, State Const., "trailers and vehicles not self-propelled used for housing accommodations and known as trailer coaches," and to impose an annual state license tax thereon of ten dollars each, such license tax to "be in lieu of all other taxes" that might otherwise be imposed on such trailers and vehicles. This section further provides that it shall be permissible for such a licensee "to operate such trailer or vehicle without a corresponding state license on the vehicle towing same." In *L. Maxcy, Inc. v. Federal Land Bank*, 111 Fla. 116, 150 So. 248, text 250, the court held that §1, Art. IX, and §16, Art. XVI, State Const., are to be "construed as a limitation upon the power of the legislature to provide for the exemption from taxation of any class of property except those particularly mentioned classes specified in the organic law." This statement by the court was quoted with approval in *State v. St. John*, 143 Fla. 544, 197 So. 131, text 134, and in *State v. Doss*, 146 Fla. 752, 2 So. 2d 303, text 304. "Exemptions from taxation, whether stated in the constitution or in statutes, are to be construed against the claimant and in favor of the taxing power in cases of doubt." To the same effect see also *Steuart v. State*, 119 Fla. 117, 161 So. 378, text 379; *Rast v. Hulvey*, 77 Fla. 74, 80 So. 750, text 753; 31 Fla. Jur. 29, et seq., §142.

Section 320.081 seems to contemplate a trailer or vehicle de-

signed for highway operation, in that it refers to "owners and operators of house trailers," and the operation of a trailer coach drawn by a towing vehicle "without a corresponding state license." The statute refers to "trailer coaches," which term is defined in 60 C. J. S. 119, as a vehicle without motive power designed for human habitation and for carrying persons and property on its own structure, to be drawn by a motor vehicle. Definitions of the term "trailer" in 42 Words and Phrases, 317-320, seem to contemplate vehicles drawn by motor vehicles primarily for the purpose of increasing the load to be moved by the motor vehicle. We doubt that §13, Art. IX, State Const., contemplates any vehicle or combination of vehicles as motor vehicles whose primary use is not the transportation of persons or property over public ways. For a trailer to be classified as a motor vehicle its construction must be such that when a self-propelled motor vehicle is attached thereto, it is immediately capable of transporting persons or property over public ways. The trailers in question, not being equipped with wheels and running gears, are not trailers within the purview of §320.081, F. S., not being capable within themselves, of transporting persons or property merely by the attaching thereto of a self-propelled motor vehicle. In this case, wheels and running gear suitable for such transportation are not even owned by the owners of such trailers.

We are, therefore, of the opinion that the trailers in question are not within the purview of §320.081, F. S., when the above rules of construction are applied thereto, and may be subjected to ad valorem taxation notwithstanding the obtaining of motor vehicle licenses under said §320.081, when they have acquired a taxable situs in this state. We do not here attempt to determine when such a trailer, when owned by a nonresident, becomes a part of the property bulk of the state.

061-83—May 18, 1961

SCHOOL CODE

ISSUANCE OF TEACHING CERTIFICATE TO EXILED OR
REFUGEE CUBAN CITIZEN—§§231.17, 231.18, 228.13 AND
228.14, F. S.

To: Thomas D. Bailey, State Superintendent of Public Instruction,
Tallahassee

QUESTION:

Under provisions of §231.17, F.S., may the state superintendent of public instruction legally issue a teaching certificate to a Cuban citizen who is now employed as a teacher in the public schools as defined in §§228.13 and 228.14, F.S.?

Section 231.17, F. S., provides, in part: "To be eligible for a certificate to serve in an administrative or instructional capacity, the applicant shall be a citizen of the United States, . . . *provided*, that the state board shall have authority to prescribe regulations under which certificates or permits may be issued to citizens of other nations not antagonistic to democratic forms of government who may be needed to teach, or who may be assigned to teach in the state on an exchange basis, and that the provisions of §231.18 shall not apply to such persons."

Section 231.18, F. S., provides:

Support of United States constitution.—Each person applying for a certificate which would make him eligible

to serve in an administrative or instructional capacity in the schools of Florida in addition to meeting all other requirements, and before receiving a certificate, shall file along with his other credentials a written statement under oath that he subscribes to and will uphold the principles incorporated in the constitution of the United States.

Sections 228.13 and 228.14, F. S., define public schools in Florida.

In my opinion the present government of Cuba could not properly be defined as "not antagonistic to democratic forms of government." This definition need not necessarily, however, be applicable to individual citizens of Cuba.

Limited solely to the facts presented in your question, it would have to be answered in the negative. In other words, a Cuban citizen loyal to the present government of Cuba could not be issued a certificate to teach under Florida law.

Assuming, however, that the teacher in question is found upon due investigation made by your department or by competent persons under your direction not to be personally antagonistic to democratic forms of government, is not loyal to the present government of Cuba but is in fact an exile or refugee from Cuba because of its present government, it is my opinion that the state board of education might authorize by regulation the state superintendent of public instruction to issue a temporary certificate or teaching permit to an individual in such circumstances if proper security safeguards are provided and required.

061-84—May 19, 1961

TAXATION

DOCUMENTARY STAMP TAXES—VETERANS ADMINISTRATION GUARANTEED LOANS— §§201.01, 201.02 F. S.

To: *Sledge T. Tatum, Veteran's Administration, Jacksonville*

QUESTIONS:

1. Are promissory notes given by veterans as evidence of indebtedness to the administrator of veterans affairs, incident to a direct loan, subject to state excise tax?

2. Are deeds to or from the administrator, in transactions involving the sale of properties to purchasers, and the acquisition of properties from holders of guaranteed and insured loans after foreclosure, subject to state documentary stamp tax?

3. In those cases in which the administrator is the successful bidder at the foreclosure sale, is the certificate of title subject to state documentary stamp tax?

4. In direct loan cases in which the veteran-borrower voluntarily conveys the security to the administrator in lieu of foreclosure, is the deed of conveyance subject to state documentary stamp tax?

Our statement in the opinion of March 14, 1961 (AGO 061-46) that "proceedings in connection with veterans administration guaranteed loans are substantially the same as" the proceeding discussed in the said opinion, must not be taken out of context, which merely and only involved a conveyance from a national bank to the federal housing commissioner, in connection with federal mortgage

insurance, in a case where the bank was conveying real property which it was in effect holding as trustee for the housing commissioner. The said opinion of March 14, 1961, considered no question of the liability of a veteran purchaser upon documents executed by him. The foreclosure of the insured loan was completed prior to the making of the conveyance from the bank to the housing commissioner, which property the bank, under the federal statute, was obligated to convey to the said commissioner upon his compliance with the guarantee obligation to the bank.

The Florida statute imposes a documentary stamp tax on mentioned documents made, signed, executed, issued, sold, removed, consigned, assigned or shipped in Florida, or for whose benefit or use the same are made, signed, issued, sold, removed, consigned, assigned or shipped in the state (§201.01, F.S.). This section appears to have been taken from an act of congress of 1924 upon a like question. The federal courts have held that the language used imposes the tax upon both the maker of the instrument, as well as the grantee, vendee, etc. The tax imposed is imposed primarily on the grantor, vendor, mortgagor, etc., and secondarily, upon the grantee, vendee, mortgagee, etc. (AGO 060,177, Oct. 28, 1960; 1959-1960 AGO 728). This being true, we may have instruments where one of the parties to the instrument may have a tax exemption while the other party is subject to the tax. Such a case may have been involved in *Plymouth Citrus Growers Ass'n v. Lee*, 157 Fla. 893, 27 So. 2d 415, involving a promissory note where the maker was the Plymouth Citrus Growers Ass'n and the payee was the Columbia bank for cooperatives of Columbia, South Carolina, which note was held subject to Florida documentary stamp taxes, in so far as the citrus growers association was concerned. Doubtless the court would have held the federal agency exempt from taxation had there been an attempt to charge it with a tax. The immunity of federal agencies or instrumentalities from state taxation applies only where they are engaged in governmental functions and where such taxation would impair their usefulness or efficiency. The question of whether a particular person or organization is a federal instrumentality, within the rule of immunity from taxation, must be determined from the facts in each case (84 C. J. S. 393-400, §207). Generally, the activities of the federal government, as well as its instrumentalities, are exempt from state taxation (81 C. J. S. 876-878, §7).

The administrator of veterans affairs, of the U.S., doubtless is an agency or instrumentality of the U.S. not subject to state taxation; however, a war veteran, no longer in military service, is not such an agency or instrumentality. A promissory note for money borrowed from the administrator of veterans affairs, made by a veteran to the said administrator, in the absence of a federal statute providing otherwise, would not seem to be an instrumentality of the federal government prior to its delivery and acceptance by the administrator, so that its making and execution would be subject to taxation under the rule in *Plymouth Citrus Growers Ass'n v. Lee*, supra, in the absence of a federal statute declaring such notes federal instrumentalities from and after their signing. When the said note is made, signed and executed by the veteran, but before delivery to the administrator, it does not become an instrumentality of the federal government and will not until delivery by its maker.

Each of the above questions, as stated in the request for opinion is predicated upon the premise that the loans made or the taxes

paid come from federal funds. If such funds are so payable they must have been provided by appropriation, which appropriation, when so provided, would seem to imply congressional consent for the imposition of the tax. We are inclined to think that such payments, if so made, are made for the account of the veteran and charged to him.

We shall next give separate further consideration to the above four questions:

AS TO QUESTION 1:

Question 1 relates to promissory notes made, executed and delivered by war veterans to the U.S. for loans made to him by the U.S. for purposes mentioned in the federal statutes. So far as we are advised, there are no federal statutes making these notes federal instrumentalities from the instant of signing, so that they do not become federal instrumentalities until delivery by their maker. These notes appear to be within the rule of *Plymouth Citrus Growers Ass'n v. Lee*, supra, and subject to documentary stamp taxes by their makers.

AS TO QUESTION 2:

Question 2 relates to conveyances to and from the administrator of veterans affairs. Conveyances from the administrator, being instrumentalities of the federal government, as well as documents made and executed in behalf of the federal government, are not subject to taxation under Florida's documentary stamp taxing statutes. Conveyances to the administrator made under like circumstances to those discussed in our opinion of Oct. 28, 1960, would likewise be tax exempt.

AS TO QUESTION 3:

Question 3 relates to foreclosure sales where the administrator is the successful bidder. This question seems to be similar to one of the questions discussed in our opinion of Aug. 19, 1953, where it was held that conveyances in connection with foreclosures were subject to taxation under §201.02, F. S. An opinion of the acting commissioner of internal revenue to this office, under date of Aug. 12, 1953, likewise held such conveyances subject to federal documentary stamp taxes. These opinions, as well as prior opinions relative to master's deeds in connection with foreclosures, are predicated on the theory that the sales made pursuant to foreclosure decrees are made for and on behalf of the defendant mortgagor or those claiming under him. These conveyances are subject to taxation under §201.02, F. S., however, for the account of such mortgagor. Payment of these taxes is discussed in our opinion of Aug. 19, 1953 (1953-4 AGO 267 and 268).

AS TO QUESTION 4:

Question 4 relates to conveyances from a mortgagor to the administrator of veterans affairs in satisfaction of an existing mortgage obligation. This transaction seems to relate to a taxable grantor and an exempt grantee. The grantor would seem to be subject to a tax under §201.02, F. S., but the administrator would not be liable therefor.

The above stated questions are answered accordingly.

061-85—May 19, 1961

**ESCHEAT OF ABANDONED PROPERTY
FILING OF FIRST REPORTS PURSUANT TO §11(d), CH. 61-10,
LAWS OF FLORIDA (§717.12(4) F. S.)—CH. 61-10, LAWS
OF FLORIDA (CH. 717, F. S.); §4, ART. XII, §§18 and
28, ART. III, STATE CONST.**

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

When are the first reports required to be filed under and pursuant to §11 (d), Ch. 61-10, including those required of insurance corporations?

Section 61-10(d), provides that the reports by persons, firms and corporations having possession of abandoned property, as defined in said Ch. 61-10, "shall be filed before November 1 of each year as of June 30 next preceding, but the report of insurance corporations shall be filed before May 1 of each year as of December 31 next preceding" Chapter 61-10 became a law upon its approval by the governor on May 11, 1961, but by the terms of §32 of said act will not take effect until Sept. 30, 1961. The above question stems from the fact that the act will not take effect until after the June 30 above mentioned, posing the question as to whether the first report to be made on Nov. 1, as of June 30 next preceding, will be required Nov. 1, 1961, or Nov. 30, 1962.

The purpose of said Ch. 61-10 is to provide for the escheat of abandoned and unclaimed personal property within the state, in the hands of the institutions, corporations, fiduciaries, agencies, and others mentioned in said act, to the state for the credit and account of the permanent school fund. Chapter 61-10 provides the machinery and procedure for accomplishing this purpose, and defines the properties subject to escheat and forfeiture. Under §4, Art. XII, State Const., the state school fund is derived, at least in part, from the "proceeds of escheated property or forfeitures," the interest "of which shall be exclusively applied to the support and maintenance of public free schools."

In Florida the public is "not charged with knowledge of the law until the same becomes effective" (*State v. Lee*, 120 Fla. 858, 163 So. 135, text 136; *Neisel v. Morgan*, 80 Fla. 98, 85 So. 346, text 358 and 359; *Sammis v. Bennett*, 32 Fla. 458, 14 So. 90). No statute has, *ex proprio Vigore*, any force until it becomes the law of the land (*Neisel v. Morgan*, *supra*). A reading of §§18 and 28 of Art. III, State Const., that an act may become a law on one date and take effect at a later date. "A distinction has been observed between the time when a bill becomes a law and the time when it goes into effect or begins to operate." (50 Am. Jur. 519, §502). Chapter 61-10 became a law on May 11, 1961, but will not take effect or become operative until Sept. 30, 1961. However, "a statute is not regarded as operating retroactively because of the mere fact that it relates to antecedent events, or draws upon antecedent facts for its operation. A prohibition of doing business after a statute goes into effect is not retroactive with regard to that business, even though the business be done in pursuance to an earlier contract." (50 Am. Jur. 493, §477).

In *Lewis v. Fidelity and Deposit Co.*, 292 U. S. 559, 54 S. Ct. 848, 78 L. ed. 1425, text 1434, a national bank was made a state depository for state funds under the laws of Georgia, in 1928, for

a period of four years; an act of congress was adopted in 1930 which had the effect of increasing the authority of federal banks in this connection. On May 23, 1932 the bank so named as a state depository was placed in federal receivership. The question arose as to whether the right under the contract of depository was to be measured by the federal laws in force in 1928, when the contract was made, or as amended in 1930; the court held that the applicable law included the 1930 act, which included rights not permitted under the law in force in 1928 when the contract was entered into. In *Reynolds v. U.S.*, 292 U. S. 443, 54 S. Ct. 800, 78 L. ed 1353, text 1357, the federal statutes in force when a Spanish war veteran was hospitalized provided that any pension payable to him was to be charged with his hospital keep, but a subsequent act provided that under like circumstances his pension would not be liable for such keep, concerning which the court stated that "a statute is not rendered retroactive merely because the facts or requisites upon which its subsequent action depends, or some of them are drawn from a time antecedent to the enactment." See also in this connection *Cox v. Hart*, 260 U. S. 427, 43 S. Ct. 154, 67 L. ed 332, text 337, where the court stated that "a statute is not rendered retroactive merely because the facts or requisites upon which its subsequent action depends, or some of them, are drawn from a time antecedent to the enactment," and 82 C. J. S. 980, §412.

A construction of §11(d), Ch. 61-10, which becomes effective on Sept. 30, 1961, as requiring that the first reports under said §11, except by insurance companies, be made on Nov. 1, 1961, as of June 30, 1961, a date prior to the effective date of said act, is not a giving of a retroactive operation to said act, although the facts and requisites upon which such report is predicated are drawn from a time antecedent to Sept. 30, 1961. The first reports to be filed under and pursuant to §11(d), Ch. 61-10, are required to be filed before Nov. 1, 1961, as of June 30, 1961, unless postponed by the administrator, as is provided in said subsection, except those reports by insurance companies, the first of which is due before May 1, 1962, as of Dec. 31, 1961.

061-86—May 23, 1961

COUNTY SCHOOL SYSTEM

COUNTY BOARD OF PUBLIC INSTRUCTION—PLACE OF MEETINGS—RECORDS OF BOARD—§230.17, F. S.

To: *Thomas D. Bailey, State Superintendent of Public Instruction, Tallahassee*

QUESTIONS:

1. In view of the provisions of §230.17, F. S., may a board of public instruction hold a regular or special meeting of the board at a place in the county seat some distance removed from the courthouse, due to inadequate space in the courthouse to accommodate large crowds desiring to attend? The regularly designated place of meeting has been the county commission room in the courthouse in the county seat.

2. In the event that a meeting at such place is authorized, may the superintendent of public instruction remove from his office in the courthouse those public

records that might be required, such as minute books, etc.?

Section 230.17, F. S., provides:

Place of meetings.—All regular and special meetings of the county board shall be held at the county seat and in the office of the county superintendent or in a room convenient to that office and regularly designated as the county board meeting room.

AS TO QUESTION 1:

The above quoted act requires meetings of the county school board to be held at a regularly designated room at the county seat, either in the office of the county superintendent or in a room convenient to said office.

I believe the intent of this act is to require the board to hold all of its meetings both regular and special at a place well known to the public so that persons having business to transact with the board or a legitimate interest in the proceedings of the board will know where to attend its meetings.

I believe it to be the duty of the board to exercise fairness and common sense in conducting its meetings in a room adequate to serve the needs of both the board and the public. The meetings do not have to be in the courthouse itself but may be conducted in a room in the county seat reasonably near the superintendent's office and convenient to both school officials and the public that is a known place and adequate for the purpose.

If the regular meeting room is undergoing repairs or for some other reason temporarily not usable, then the meetings must necessarily be held in some other room which must meet the above mentioned general requirements. The place and time of the meeting regardless of where it is held, should be publicized so that the public can be properly informed and attend (*Motes v. Putnam County*, 143 Fla. 134, 196 So. 465).

AS TO QUESTION 2:

It is my opinion that in the event it is necessary to hold a meeting of the school board in a room which is not the regular meeting place of the board, the county superintendent could take to the meeting such public records as the board might require or would be necessary during the course of the meeting, but that the superintendent must keep said records in his personal custody and accept responsibility for this safekeeping.

Subject to the above observations, both questions are answered in the affirmative.

061-87—May 24, 1961

TAXATION

STOCK IN TRADE; LOCAL BUSINESSES—CONSTRUCTION
OF §200.021, F. S.—§§192.04 AND 192.05, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Where a business concern of this state, engaged in selling goods, wares and merchandise at retail, establishes a retail store in a county of the state subsequent to Jan. 1 but before April 1 of a tax year, is its stock in trade and equipment subject to ad valorem taxes for the then current tax year?

Section 200.021, F. S., provides that "all tangible personal

property, as defined by §200.01, located in the state between January 1 and March 31 of each year (both dates inclusive) shall be taxable for said year . . . ; provided, that tangible personal property brought into the state after January 1 and before April 1 of any year shall be taxable for that year only if such property is brought into the state for resale or the assessor has reason to believe that such property will be removed from the state prior to January 1 of the next succeeding year." This same section further provides that "all tangible personal property which is removed from one county in this state to another after January 1 of any year shall be subject to taxation for said year in the county where it was located on January 1." The reason for the enactment of said §200.021 (Ch. 28302, 1953) doubtless was the court's opinion in *Overstreet v. Ty-Tan, Inc.*, Fla., 48 So. 2d 158, construing §§193.11 and 200.13, F. S., as not authorizing the assessment of properties brought into the state subsequent to January 1 of the tax year.

Although the first part of §200.021 relates to all tangible personal property brought into the state between January 1 and April 1 of a tax year, *the latter parts of the said section seem to limit its operation to property brought into the state for resale and property the assessor feels will be removed from the state prior to the beginning of the next tax year.* Section 192.05, F. S., provides that "all personal property considered as goods, wares and merchandise, commonly known as stock in trade, may be assessed for the purpose of taxation . . . at a valuation based upon the average value of such stock of goods . . . or stock in trade, as held or owned over a period of 12 months next preceding the first of January for the year for which the assessment was made." Section 192.04, F. S., generally provides that "all real and personal property shall be subject to taxation on the first day of January of each year. . ." so that generally the status of real and personal property on January 1 of the tax year determines its taxable status (*Gelb v. Aronovitz*, Fla. App., 98 So. 2d 375, text 378; *Gautier v. Lapof*, Fla., 91 So. 2d 324, text 325 and 326; *Simpson v. Hirshberg*, 159 Fla. 25, 30 So. 2d 912, text 914; *Overstreet v. Ty-Tan, Inc.*, *supra*; *Dolores Land Corp. v. Hillsborough County*, Fla., 68 So. 2d 393). Section 200.021, F. S., appears to be a limited exception to the rule established by said §192.04, F. S.).

In this state "it is a cardinal rule that statutes conferring authority to impose taxes must be construed strictly in favor of the taxpayer and against" the taxing power (*Lee v. Gaddy*, 133 Fla. 749, 183 So. 4, text 6; *Atlantic Coast Line Railway Co. v. Amos*, 94 Fla. 588, 115 So. 315, text 321; *Overstreet v. Ty-Tan, Inc.*, Fla., 48 So. 2d 158, text 160; *Culbreath v. Reid*, Fla., 65 So. 2d 556, text 557; 30 Fla. Jur. 482-484, §52). "Where a general rule is established by statute with exceptions, the court will not curtail the former or add to the latter by implication. It is a general rule that an express exception excludes all others, that is, an exception in a statute amounts to an affirmation of the applications of its provisions to all other cases not excepted" (82 C. J. S. 893 and 894, §382; 50 Am. Jur. 451 and 452, §431). An exception is similar to a proviso and would seem to take a like construction.

Doubtless §200.021, F. S., was designed to reach those businesses which are seasonal in their operation and which operate in Florida only during a portion of the year, and open their doors after Jan. 1 of a tax year and close them prior to Dec. 31 of the same year, so that they have no property in the state on the tax day. Said section was never intended to apply to those businesses within

the purview of §192.05, where the business once established may be reasonably expected to continue from year to year. Section 200.021 has no application to those businesses established after the Jan. 1 tax day, which by their very nature may reasonably be expected to continue from year to year, and which will not operate on a seasonal basis.

From the above we conclude that where a business concern of this state, engaged in the selling of goods, wares and merchandise at retail, establishes a retail store in a county of the state subsequent to Jan. 1 but before April 1 of a tax year, its stock in trade and equipment are not subject to ad valorem taxes for the then current tax year, where the store so established is not of a seasonal nature and may well be expected to continue from year to year.

061-88—May 24, 1961

RACING

AUTHORITY OF STATE RACING COMMISSION TO GRANT OPERATIONAL DAYS TO TAMPA JAI ALAI FRONTON—CHS. 550 AND 551; §§550.04 AND 551.12, F. S.

To: Robert M. Morgan, Chairman, Florida State Racing Commission, Miami

QUESTION:

Is the state racing commission authorized to grant to Tampa jai alai fronton 100 racing days (plus 1 scholarship and 1 charity day), which 100 days can extend beyond April 10, but not beyond May 31 of any year?

Section 551.12, F. S., provides that Ch. 550, F. S., shall be applicable to matters relative to the issuance and granting of permits and licenses to frontons under Ch. 551 to the extent that such provisions of Ch. 550 are not inconsistent with the express provisions of Ch. 551.

Section 550.04, F. S., provides that the winter dog racing season shall extend from and including November 1 to and including May 31 of the following year. It would appear that by the terms of §551.12, F. S., the winter fronton season would be similarly defined or established, that is, from Nov. 1 to May 31. While §551.12 provides that the commission shall not limit the number of operational days in any 12-month period to less than 90 days, from and including Dec. 1 to April 10, it has been held that such language is a limitation on the power of the commission and not a limitation on the period during which frontons may be operated (*Volusia Jai Alai, Inc. v. McKay*, 90 So. 2d 234).

This office in AGO 59-140, dated July 10, 1959, and published in the 1959-60 biennial report of the attorney general at p. 210, held that the maximum number of days which can be granted to any fronton operator during any 12 month period is 100 days plus one scholarship and one charity day. However, such opinion did not limit or establish the period within which such 100 days must fall.

In accordance with the above cited statutes and authority, it is my opinion that the racing commission is authorized to permit the Tampa jai alai fronton, upon its request, to operate its 100 days plus the charity and scholarship days at any time from Nov. 1 to May 31 inclusive.

Your question is therefore answered affirmatively.

061-89—May 25, 1961

COUNTY SCHOOL SYSTEM

COUNTY'S RESPONSIBILITY TO FURNISH OFFICE SPACE FOR COUNTY SUPERINTENDENT—§230.29, F. S.

To: Richard E. Nelson, County Attorney, Sarasota

QUESTIONS:

1. What, if any, absolute obligation is imposed upon the county to furnish office space for the superintendent of schools by virtue of §230.29, F. S.?

2. If an obligation exists by virtue of said §230.29, F. S., is it possible to satisfy this obligation and be forever released therefrom by the lump sum payment from the county to the board of public instruction?

Section 230.29, F. S., provides as follows:

Office of county superintendent; where located; how maintained.—The county superintendent shall have his office at the county seat. Office space shall be provided and heat and light furnished by the board of county commissioners; provided, however, that in the event such office space as above required is not provided by the commissioners, the county board may provide such space as is needed. The office shall be provided with furniture, equipment, telephone, supplies, and other essentials by the county board.

The above section unquestionably is not without at least a vestige of ambiguity. Such ambiguity exists primarily because of the proviso that if such office space is not provided by the commissioners, the county board may provide space as is needed for the county superintendent. It appears to me that said section contemplates in the first instance that the county superintendent, whenever possible, should have his office in the courthouse or some other building under the control of the board of county commissioners located at the county seat.

Because of the proviso in said section, it does not appear that the legislature intended the obligation of the board of county commissioners to provide office facilities for the county school superintendent to be absolute. The statute in its most reasonable sense appears to authorize an expenditure of county funds, or in the alternative, an expenditure of county school funds to provide office space for the county school superintendent. It is my opinion that the board of county commissioners, if county funds are available, would, under this section, be authorized to contribute such funds to the construction of a county school superintendent's office facility.

It is my further opinion that the board of county commissioners and the board of public instruction could by agreement recognize such a contribution as being a discharge of any present obligation on the part of the county to furnish additional moneys for the operation of such project. However, there is serious doubt that such an agreement between the present board of county commissioners and board of public instruction could be considered binding as to future boards.

It is also my opinion that the operating expense of the office

of county superintendent is to be borne by the county board of public instruction.

061-90—May 25, 1961

TAXATION

CONSTRUCTION OF §§193.49 AND 200.30, F. S., RELATING TO SEIZURE AND SALE OF TANGIBLE PERSONAL PROPERTY REMOVED OR ABOUT TO BE REMOVED FROM TAX SITUS—§§193.47, 200.28, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

What procedure should be followed in the seizure and sale of tangible personal property under the latter portions of §§193.49 and 200.30, F. S.?

Sections 193.49 and 200.30, F. S., appear to relate to two circumstances. The first sentence of each said section relates to tangible personal property, against which taxes have been levied, which are not yet delinquent in point of time, which have been removed from the county, after the making of the levy, in such manner as to endanger the collection of the tax. The remainder of the said sections relates to tangible personal property, upon which taxes have been assessed, but which taxes are not yet delinquent, which, although the property remains in the county, it is in the process of being removed from the county, or is being disposed of, in such manner as will defeat the collection of the tax unless such property be immediately seized.

Where the property has been removed from the county into another county of the state, the tax collector is required to issue a tax warrant for the collection of the tax and deliver the same to the sheriff of the county wherein the property has been moved, to be executed by seizing and taking possession of the property, therein to be described, and selling the same *as upon execution from the circuit court*.

Where the property, although remaining in the county, is in the process of being removed therefrom, or is being disposed of in such manner as will prevent or endanger the collection of the tax assessed thereon, a similar tax warrant should be issued for its seizure, to be executed by the tax collector "in the manner and under the same rules of law governing attachments for debts, dues or demands in other cases." In this case, the warrant should not be delivered to the sheriff but should be enforced by the tax collector; only when the property has been removed from the county should the tax warrant be delivered to and enforced by a sheriff.

Attachments for debts, etc.—In the latter case, the tax collector is directed to proceed "in the manner and under the same rules of law governing attachments of (for) debts, dues or demands in other cases." An attachment is a proceeding by which personal property is seized and brought into custodia legis pending the termination of a proceeding, in law or equity, for the collection of a debt or demand (7 C. J. S. 185, §1; 4 Am. Jur. 552, §3; 3 Fla. Jur. 199, §2). An attachment has been said to be a dependent proceeding designed to hold property in custodia legis during the pendency of an action or suit (*Tilghman v. U. S. Fidelity and Guaranty Co.*, 90 Fla. 282, 105 So. 823, text 826; *Jensik v. Studstill & Hollenbeck, Inc.*, 153 Fla. 870, 16 So. 2d 165, text 166). The

above references in said §§193.49 and 200.30, F. S., to the rules of law governing attachments for debts, dues or demands appear to relate to the seizure procedure and not the sale of the property seized under the tax warrant.

Procedure to be followed.—Although the procedure to be followed by sheriffs of other counties, to whom tax warrants have been delivered by tax collectors is the same as on executions out of the circuit court, the tax collector, proceeding under the latter part of §§193.49 and 200.30, proceeds as in attachments, to obtain possession of the property for purposes of sale, but proceeds as provided in §§193.47 and 200.28, F. S., in making sales of the property seized. The reference in §200.28, to the *preceding section*, differs to a similar reference in §193.47, which is made applicable to personal property levied upon for taxes. Unless these sections be applicable, there appears to be no other applicable provision, as no sales are made under attachments as such. We hold them applicable.

The above observations answer the above stated question.

061-91—June 2, 1961

LEGISLATION

EFFECTIVE DATES OF ACTS OF THE FLORIDA LEGISLATURE—§§18, 28, ART. III, STATE CONST.

To: Tom Adams, Secretary of State, Tallahassee

QUESTION:

When does an act of the Florida legislature become effective?

A reading of §§18 and 28, Art. III, State Const., reveals that an act may become a law on one date and become effective on another date. "A distinction has been observed between the time when a bill becomes a law and when it *goes into effect or begins to operate*" (50 Am. Jur. 519, §502). Section 18, Art. III, State Const., provides that "no law shall take effect until 60 days from the final adjournment of the legislature at which it was enacted, unless otherwise specially provided in such law" (emphasis supplied). Acts which otherwise specially provide therein for their effective date seem to fall into those which provide that they (1) become effective upon becoming a law, (2) become effective upon approval by the governor, (3) become effective upon a specified date and (4) become effective at a specified time on a specified day. Under §28, Art. III, State Const., a bill may become a law (but not effective unless so provided) upon (a) being approved by the governor, (b) upon the failure of the governor to return the bill within a specified time, and (c) upon its passage over his veto.

First, we will consider those acts making no provision for their own effective dates and coming within the purview of §18, Art. III, State Const., so that they become effective "sixty days from the final adjournment of the session of the legislature at which it may have been enacted." In *Thompson v. State*, 56 Fla. 107, 47 So. 816, and in *Re Alexander*, 53 Fla. 647, 44 So. 175, two acts of the 1907 regular session of the Florida legislature, neither of which fixed their own effective dates so that they were within the purview of said §18, Art. III, were involved and the date they became effective put in issue. The final adjourn-

ment of the said 1907 regular session was on May 31, 1907; in each of the above cases the court held that they became effective on July 30, 1907. In *State v. Lee*, 112 Fla. 109, 150 So. 225, an act had been adopted at an extraordinary session, which was finally adjourned on June 25, 1931, which act contained no provision fixing its own effective date; it was held to have become effective Aug. 24, 1931. In *McMillen v. Hamilton*, Fla., 48 So. 2d 162, text 163, the court held that "the general rule for the computation of time, accepted and recognized in this jurisdiction, is that where an act is to be performed within a specified period of time, the first day is excluded in the computation and the last day of the period is included." See also 32 Fla. Jur. 122, §5; 86 C. J. S. 848, §13(1); 52 Am. Jur. 342, §17, to the same effect. In *Crawford v. Feder*, 27 Fla. 523, 8 So. 642, it was stated that the law takes no notice of fractions of a day, except in questions of priority of rights or conflicting rights. To the same effect, see also 52 Am. Jur. 339, §15. Under this rule the said acts took effect with the first moments of the day upon which they became effective. See also 82 C. J. S. 976, §406. This answers the above question as to acts containing no provision fixing their own effective date.

Second, we will consider those acts, containing provisions making them effective upon becoming a law, which become laws without the approval of the governor upon the running of either the five day or the 20 day provision in §28, Art. III, State Const. The said five day provision is that "if any bill shall not be returned within five days after it shall have been presented to the governor (Sunday excepted) the same shall become a law, in like manner as if he had signed it." The 20 day provision is that "if the legislature, by its final adjournment prevents such action, such bill shall become a law, unless the governor within 20 days after adjournment" vetoes the same in the manner provided. In counting the said five and 20 day periods the same rule is followed as in counting the 60 day period above mentioned, except Sundays are excluded from the five day period. Intervening Sundays are included in the calculation of the 20 day period (*Croissant v. DeSoto Impr. Co.*, 87 Fla. 530, 101 So. 37, text 41; *Smithie v. State*, 88 Fla. 70, 101 So. 276, text 278). Generally, in computing time within which an act must be done, if the last day falls on Sunday that day cannot, in accordance with the general rule in this state, be excluded from the computation, in the absence of a statute or constitutional provision manifesting an intention to the contrary (*Newsom v. State*, Fla., 54 So. 2d 58 and cases cited). Section 28, Art. III, provided a 10 day period, instead of the present 20 day period, when *Croissant v. DeSoto Impr. Co.* and *Smithie v. State*, supra, were decided. There the legislature adjourned on June 3, 1921, and the acts were vetoed on the said June 14; the court held that the bills became laws on June 13, 1921, prior to the governor's veto on June 14, 1921. The law generally taking no notice of parts of a day, the bills involved in said cases became laws the first moments of said June 14, 1921. One of the acts involved provided that it would take effect upon its becoming a law. This being true, it became effective at the time it became a law. This answers the above stated question in so far as it relates to bills becoming a law without the governor's signature, which provide that they become effective upon becoming a law.

Third, we will consider those acts containing provisions that

they become effective upon a specified date subsequent to the time they become laws. Under the rule above mentioned that the law usually takes no notice of fractions of a day (*Crawford v. Feder*, *supra*) such acts become effective the first moments of the day specified as the effective date. However, some acts have provisions making them effective at a specified minute, or hour, in a specified day; in such cases, the act takes effect at the beginning of the minute or hour specified. By reason of two different time belts in Florida there would be an hour's difference between the actual taking effect of an act between the eastern and central time belts.

Fourth, we will consider those acts approved and signed by the governor which contain the provision that they become effective immediately upon becoming a law. Acts providing that they become or take effect immediately upon becoming a law, or words of like effect, take effect immediately upon their becoming a law (*State v. Couch*, 139 Fla. 553, 190 So. 723, text 732; 82 C. J. S. 961, section 400). "Under constitutions which, by providing in effect that no bill shall become a law until it shall have received the approval of the chief executive or shall have been passed over his refusal to approve, make the executive a necessary constituent of the lawmaking power, an act *becomes a law*, not when it is passed by the two houses of the legislature, but when it is approved by the executive." (50 Am. Jur. 512, §488; see also 82 C. J. S. 83, §51). It, therefore, appears that an act of the legislature, when approved by the governor, *becomes a law* when approved; however, we must keep in mind that *becoming a law* and *taking effect* are not the same and must be distinguished (50 Am. Jur. 519, §502). A statute takes effect on the 60th day after the adjournment of the legislature, unless another effective date be fixed by the act itself. An act containing a provision that it becomes effective upon becoming a law will take effect upon its approval by the governor. We shall hereinafter discuss the precise time of taking effect when approved by the governor where the act by its terms becomes effective upon becoming a law.

Fifth, we will next consider those acts passed over the veto of the governor, which by their terms take effect upon becoming a law. Section 28, Art. III, State Const., provides that if a vetoed bill "shall pass both houses by a two-thirds vote of members present . . . it shall become a law." (Emphasis supplied.) This seems to indicate that such an act becomes a law upon the completion of the legislative processes. The time of the certification of the passage of the act over the governor's veto, to the secretary of state, would seem to fix the date the bill became a law. Our discussion of the *fourth* problem above would seem also to be applicable here upon the taking effect of the act.

Filing of act with secretary of state.—We come next to the question of whether or not a bill to become a law must be filed in the office of the secretary of state. In *State v. Bledsoe*, 159 Fla. 243, 31 So. 2d 457, house bill 122, of the 1947 regular session of the Florida legislature, after being adopted by both houses was duly certified to the governor for approval or rejection, having been duly presented to the governor on May 8, 1947. On May 13, 1947, the house of representatives, without the concurrence of the senate, recalled the said bill from the governor, which bill was duly delivered to the said house by the governor. Upon receipt of the said bill it was returned to the calendar of the house, where it re-

mained at the time of the adjournment of the 1947 regular session of the said legislature. The court held that the house of representatives was without authority to recall the said bill from the governor, and that the governor was without authority to surrender the same under the circumstances mentioned, and that the bill became a law upon the running of the five days mentioned in §28, Art. III, State Const., for his action thereon. Here the court said that the said bill became a law, although not then in the office of the secretary of state. See also *Croissant v. DeSoto Impr. Co. and Smithie v. State*, supra. This case, as the last two above mentioned, leads us to the view that it is not necessary that a bill, duly approved by the governor or becoming a law without his approval, be actually filed in the office of the secretary of state to become a law. Where a bill becomes a law, whether upon the approval by the governor, or by the running of time without such an approval, such bills, when filed away by the secretary of state, being an enrolled bill, becomes the highest evidence of what the law is (82 C. J. S. 93, §60). The failure to file a bill, which has become a law, does not affect such bill as the law of the land; *at most*, such failure can go only to constructive notice of such a law, and cannot invalidate the law.

Sometimes a bill, duly delivered to the governor, will find its way into the office of the secretary of state, without having been approved by him, prior to the running of the time allowed under §28, Art. III, State Const., for approval or veto by the governor (sometimes there being evidence that the governor has determined to permit the same to become a law without his approval). This does not seem to amount to an approval by the governor, so as to stop the running of the five and 20 day periods for approval under said §28, Art. III. Notwithstanding such filing with the secretary of state, such bills do not become laws until the running of such periods of time. The file mark placed upon such bills by the secretary of state may not be taken as evidence of the date the bill became a law. Where a bill becomes a law without the governor's approval, the date upon which it became a law must be measured from the time it was presented to the governor by the legislature, as provided in said §28, Art. III. The stamp of the secretary of state evidencing date of filing is evidence of nothing other than said date of filing and may not be taken as fixing the date the bill became a law or its effective date.

Time of taking effect; fraction of a day.—Under the common law, unless an act provided otherwise, it took effect at the beginning of the session (1 Sutherland Stat. Constr., 3rd Ed. 262, §1601). In the early days of this country no notice was taken of parts of a day, and some of the courts held that an act became a law and took effect at the beginning of the day enacted, others at the beginning of the following day (50 Am. Jur. 523, §510; 1 Sutherland Stat. Constr., 3rd Ed. 274 and 275, §1608). Under these rules an act sometimes became effective before its actual enactment. "To avoid this result, the tendency now is to hold that, whenever necessary to prevent a wrong or assert a meritorious right, or in general to determine conflicting rights, courts of justice will inquire as to the exact time of the day of the passage of a statute, and effect will be given to it only from that time." (50 Am. Jur. 523, §510). To the same effect see also 1 Sutherland Stat. Constr. 3rd Ed. 274, §1608, where it is stated that "a statute should not commence operation six hours before its passage just as a statute should not be effective six days or six years before

its actual enactment. A statute which is to take immediate effect is operative from the exact instant of its becoming a law by the weight of American authority." To the same effect see also 82 C. J. S. 976, §406, and annotations in 2 Ann. Cas. 135-137 and 1 L. R. A. (NS) 135-137. From these authorities we gather the general rule to be that the exact time a bill becomes a law will not be deemed material except where, from the nature of the case, justice demands that a fraction of a day be taken into account to prevent a miscarriage of justice.

From the above mentioned constitutional provisions and authorities bearing upon the question, we conclude:

1. That an act of the legislature containing no provision fixing its effective date becomes effective on the 60th day after the final adjournment of the session of the legislature at which enacted. Said time to be calculated by omitting the day of adjournment and counting off 60 days, the act becoming effective on the 60th day.

2. Where a bill contains a provision making it effective upon its becoming a law it will take effect on the fifth day, if during the session, after it was delivered to the governor, and if after adjournment on the 20th day after adjournment of the legislature, counting in the same manner as the 60 days above mentioned was counted, except intervening Sundays will be omitted from the five day period but not the 20 day period.

3. Where a bill contains a provision fixing its effective date on a specified day, it becomes effective at the beginning of that day, that is the first moments thereof.

4. Where a bill contains a provision fixing its effective date at a specified minute or hour of a given date it will take effect at the beginning of such minute or hour.

5. Generally a bill, by its terms effective upon becoming a law, which becomes a law by reason of approval by the governor, or by being passed over his veto, will be considered as being effective during such day, however, where justice demands otherwise it will be deemed effective at the exact time it became a law.

6. The filing date placed on acts delivered to the secretary of state, by the governor or by the legislature itself, is of little, if any, benefit in determining effective dates of acts. Seldom does it determine the date a bill became a law or the effective date of an act. It may, however, but we do not decide this point of law, be the date from which the public is charged with constructive knowledge of the act.

061-92—June 2, 1961

TAXATION

CORRECTION OF ERRORS OF OMISSION AND COMMISSION IN CONNECTION WITH THE ASSESSMENT OF AD VALOREM TAXES—§§192.21, 192.31, 193.25, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. What authority, if any, does a county board of tax equalization have over the county tax roll after having adjourned sine die?

2. What is the procedure to be followed by a county assessor of taxes in making corrections of errors of omission or commission under and pursuant to §192.21, F.S.?

3. Where a county assessor of taxes makes certain corrections or changes in tax assessments, purporting to act under and pursuant to §192.21, F. S., must these corrections be submitted to the county board of tax equalization for approval?

4. Where a county assessor of taxes submits to the county board of tax equalization a report of changes in assessments pursuant to §192.21, F. S., what is the effect of the failure of the board to act on same?

AS TO QUESTION 1:

The court, in *Sparkman v. State*, 71 Fla. 210, 71 So. 34, text 41, stated that in that case the county board of tax equalization "had sat as long as it deemed necessary, and there being no complaints, the board adjourned sine die as a board of equalization. The county commissioners have no general power in making tax assessments but only such special and limited powers as are specifically conferred by statute to secure equalization of tax value. When the power, as specially conferred, is exercised, and final adjournment is taken, their special powers as a board of equalization cease." In this case an assessment of \$109,000 had been made against a banking corporation, which was greatly in excess of the previous annual assessments and the bank, presuming that no change in its assessment had been made, did not learn of the increase until after the adjournment sine die of the board, but upon learning of the increase, protested the same before the board, after which the board directed a reduction in the said assessed value to the sum of \$17,900, which reduction was rejected by the assessor of taxes and the change was not made as directed. On a proceeding in mandamus against the tax assessor to comply with the board's order, the court held that the board lost jurisdiction of the matter upon its sine die adjournment as a board of tax equalization, so that its order was void. This opinion does not appear to have been overruled (see *Saunders v. State*, Fla., 46 So. 2d 491, text 494; *Sanders v. Crapps*, Fla., 45 So. 2d 484, text 488). Under these authorities, question 1 must be answered in the negative, unless the rule announced in *Sparkman v. State*, supra, has been changed by statute.

Sparkman v. State, supra, was decided by the court on Feb. 15, 1916, prior to the enactment of Ch. 10040, 1925, which act in part provided that "no act of omission or commission on the part of any tax assessor, or any assistant tax assessor, or any tax collector, or any board of county commissioners . . . shall operate to defeat the payment of said taxes; but any such acts of omission or commission may be corrected at any time by the officer or party responsible for the same in like manner as is now or may hereafter be provided by law for performing such acts in the first place and when so corrected they shall be construed as valid ab initio . . ." The above quoted language was retained when said Ch. 10040 was amended by Ch. 14572, 1929, by Ch. 17442, 1935, and by Ch. 20722, 1941, which acts have been brought into the Florida Statutes as §192.21, F. S. Said §192.21 also provides that "all provisions of law now existing or which may be hereafter enacted relating to the assessment and collection of revenue (unless otherwise specifically so declared) shall be deemed and held to be directory only, designed for the orderly arrangement of records and procedure of officers in enforcing the revenue laws of the state."

The effect of said §192.21 was considered by the court in

State v. Lummus, 111 Fla. 746, 149 So. 650, text 651, where the court said that "the effect of the statutes is to impose upon the tax assessor a continuing duty to prepare according to law a legal tax roll, and, if through oversight, mistake, or inadvertence, he has failed to do so, the statute itself affords ample power and authority for the tax assessor to correct his mistake in the preparation of the roll by forthwith making the necessary changes and amendments of the roll to make the same conform to the 'form of things' required by the tax laws." Any change in an assessment made pursuant to §192.21, requiring consideration by the board of tax equalization may be considered by the said board at any regular meeting of the board of county commissioners and acted on.

AS TO QUESTION 2:

One of the purposes of §192.21, F. S., was to impose upon the taxing officials the duty of preparing and producing a valid and correct tax roll, even where corrections are necessary to effect that purpose. The provision in said section that "any such act of omission or commission may be corrected at any time by the officer or party responsible for the same," contemplates that errors made by the assessor of taxes be corrected by him, and that errors made by other taxing officials be corrected by them. The court, in State v. Lummus, supra, stated that "the effect of the statute is to impose upon the officer having the actual custody of the tax roll requiring correction the duty to permit access to it by the tax assessor in order that the tax assessor may do what the law requires him to do so as to show a regular and valid record of his assessment." (Emphasis supplied.)

In Price v. Gray, 111 Fla. 1, 149 So. 804, text 805, the court remarked that Ch. 10040, 1925, and like laws, "was to cure certain defects in the tax assessment and collection laws theretofore found and pointed out in prior judicial decisions." In Rio Vista Hotel and Impr. Co. v. Belle Mead Devel. Corp., 132 Fla. 88, 182 So. 417, it was held that the failure of a tax assessor to annex the required statutory warrant to the tax roll did not invalidate the roll, and "that the tax assessor may annex the required warrant at any time." In Fort Myers v. Heitman, 148 Fla. 432, 4 So. 2d 871, text 873, the court remarked that "at least since the effective date (of §192.21, F. S.), an illegal assessment of taxes upon lands may be amended where the tax is duly authorized." In Fort Myers v. Heitman, supra, it is further stated that the effect of §192.21, F. S., "is that no act of omission or commission in making assessments for ad valorem taxation shall operate to defeat the payment of duly authorized taxes, but any such acts of omission or commission may be corrected at any time and when so corrected shall be valid ab initio and the assessment enforced." As was said in Boley v. Hilbun, 124 Fla. 583, 169 So. 409, concerning Orlando v. Giles, 51 Fla. 422, 40 So. 834, and Florida East Coast Fruit Land Co., 80 Fla. 291, 85 So. 661, the law has been materially changed since Sparkman v. State, supra, by §192.21, F. S.

The state comptroller, pursuant to §192.31, F. S., and under the supervision of the state budget commission, on Feb. 8, 1952, prescribed the following rules and regulations relative to changes and corrections of tax assessments, made under and pursuant to said §192.21, F. S., to wit:

Errors of the tax assessor caused by a misunderstanding or disregard of existing facts may be corrected, after the tax roll is delivered to the tax collector. Among

such errors the following appear to be the more frequent:

1. Including in the assessed value, for a particular year, the value of a building which has been erected since Jan. 1 of that year or assessing as improved, property which has no improvements, and vice versa, if the error is discovered before the tax is paid.

2. The failure to allow exemption on homesteads for which application has been filed within the time provided by the statutes, or wrongfully allowing the exemption on property not entitled to it.

3. Error in extending the aggregate amount of taxes.

4. A typographical error by which an additional naught is added, thus arbitrarily wrongfully increasing the value tenfold or more.

When any errors in the above classes, as well as those of a similar nature, are called to the attention of the tax assessor, he should at once prepare a certificate showing that such error has occurred, how it occurred, together with all the facts available that may tend to show the existence of such error, and the correct figure to be used.

An assessor's certificate involving a change in valuation, similar to example 1 above, must be approved by the board of county commissioners before it may be used by the tax collector. Other assessor's certificates do not require the approval of the board of county commissioners.

The assessor's certificate shall be delivered to the tax collector, who thereupon is authorized to collect the correct amount as shown in the certificate and make proper record and report of the difference, if the amount collected is more or less than the amount originally shown on the tax roll.

Under no circumstances can the above be construed to authorize the arbitrary changing of the assessed valuation of properties.

These rules and regulations appear proper and correct and should be followed, when applicable, until changed, set aside or revoked.

Whenever a county assessor of taxes discovers an error of commission or omission requiring correction under §192.21, where the tax roll has been certified and delivered to the tax collector, he should request access to the said roll, for the purpose of making such corrections, or request that they be made by the tax collector for and in his behalf, it being the duty of the tax collector to make such roll available to the assessor under the rule announced in *State v. Lummus*, supra.

AS TO QUESTION 3:

Where a county assessor of taxes, pursuant to said §192.21, corrects errors of omission or commission, he should conform strictly to the requirements of the above quoted rules and regulations of Feb. 8, 1952, including any amendments or extensions thereof, being careful to report to the board of county commissioners, in their capacity as county tax equalizers, the matters and things required by such rules and regulations. These observations seem to answer question 3.

AS TO QUESTION 4:

Under §192.21, corrections of errors of omission and commission made pursuant to said statute "shall be construed as

valid ab initio and shall in no way affect the process by law for the enforcement and collection of such tax." This statute contemplates a procedure under which due process is accorded to taxpayers in like manner as in assessments where no errors of omission or commission are committed. Where valuations are increased by reason of the correction process, or homestead tax exemption status is changed to a denial of the right claimed, the taxpayer has the rights and remedies he would have had had the correct assessment or the correct ruling on the application for homestead tax exemption been made in the first instance. Where in the process of correcting errors of omission or commission a valuation has been increased, or the claim for homestead tax exemption has been changed from a grant to a denial, the taxpayer should be given the right to make a protest and have the same reviewed by the county board of tax equalization, otherwise there might be a denial of due process. Likewise, the equalization board has the right to increase or decrease the corrected valuation should they deem it improper.

Section 192.21 puts the corrected assessment on a plane with the original assessments as far as the rights of the taxpayer is concerned. When an assessor of taxes files with the board of tax equalization his report of changes made pursuant to the authority of said §192.21, such corrections, like the original assessments, become final unless protests be made by the taxpayers or some change is made by the board of equalizers. Upon receipt of such a report from the assessor of taxes the board may fix a date for "perfecting, reviewing and equalizing" corrected assessments and taking like proceedings as are authorized by section 193.25, F. S., at regular equalization hearings. In the case of such corrected assessments time is an important element so that, in the absence of express protests from taxpayers, the failure of the board to proceed with reasonable dispatch to "perfect, review or equalize" the corrected assessments will waive its right and such corrected assessments, in the absence of a protest from a taxpayer, will become final. The rule that a board of tax equalization loses jurisdiction over assessments upon adjourning its equalization meeting sine die, as announced in *Sparkman v. State*, 71 Fla. 210, 71 So. 34, was changed by said §192.21, to the extent of permitting the corrections therein provided for.

These statutes, authorities and observations lead to the following answers to the above stated questions:

1. The authority of a county board of tax equalization, after having adjourned its equalization meeting sine die, is found in §192.21, F. S., and is limited to the consideration of corrections of errors of omission and commission of assessments pursuant to said section, and the correction of their own errors of omission and commission pursuant to said section.

2. Where a county assessor of taxes discovers errors of commission or omission in the tax roll, and corrects them under and pursuant to said §192.21, he should *first*, either obtain access to the tax roll, if in the hands of the tax collector, making the corrections thereon, or, should the tax collector prefer to make the corrections himself, advise the said collector of the changes to be made. He should also, where such changes have the effect of increasing assessments or denying homestead tax exemption claims, make a report thereof to the board of tax equalization and the taxpayers adversely affected.

3. Only those changes made relative to valuation and homestead tax exemption, detrimental to the taxpayer, are required to be reported to the board of tax equalization and to interested taxpayers; however, we see no objection to the tax assessor making a full report to the board of all changes made of every kind and nature should such a report be desired by both, although the board would have jurisdiction only of the above mentioned changes.

4. Like original tax assessments, the board of equalization and the taxpayers have the burden of moving against the corrections made by the tax assessor, in so far as they relate to valuations and denial of homestead tax exemption claims; otherwise, like original assessments, they become final within a reasonable time. The board is not required to actively concur in a change made by the assessor for it to become effective; only an objection by a taxpayer or positive action, within its jurisdiction, by the board will prevent the change from becoming effective.

061-93—June 6, 1961

JUDICIAL DEPARTMENT

WITNESSES—MILEAGE, PER DIEM—§90.14, F. S.

To: *John B. Dunkle, Clerk, Criminal and County Courts, West Palm Beach*

QUESTION:

Under §90.14, F. S., to what per diem and mileage would a witness be entitled, which witness attends court one day and must wait one or several intervening days prior to appearing in court again on the same matter?

AGO 046-47, p. 150 of the 1945-1946 biennial report of the attorney general, indicates that a juror or witness is entitled to mileage for only one round trip when such juror witness returns home each consecutive night after appearing in court that day. Such opinion does not deal directly with instances wherein there is an intervening day during which the witness does not have to appear.

The rationale of AGO 046-47, supra, is correct when applied to the situation presented in such opinion. The situation involved in that opinion is that the party would appear in court each day but would travel home each night. Such party would be entitled to per diem. Per diem is for the daily expenses which would be incurred other than mileage, and such expenses would include room and board for the night. Practically speaking, of course, per diem may not fully cover the expense of room and board. However, when it is considered that a witness has the duty to the community as a whole to appear and that performance of such duty could be commanded without compensation, we realize that it is within legislative discretion to set compensation at an amount below that which would be necessary to meet all expenses. Obviously, in the situation indicated by AGO 046-47, the witness could have stayed in town each night and would have been entitled to per diem for each 24-hour period; and the court had a right to assume that such procedure would be followed and, therefore, to pay the witness only per diem without mileage. If the witness travels home in such situation, no per diem is lost because the witness is back for duty the next day. However, if there is an intervening day, a trip home will remove the right to per diem and may, therefore, be justified

as a saving in situations where the witness lives relatively near the court.

As shown in 1940 AGO 90, a material witness who is detained in the locale of the court over a period of several days is entitled to per diem for each day so detained even though he is not required to be in court.

In AGO 056-313, this office points out that a judge cannot provide funds in excess of normal per diem for the expenses of meals and lodging which witnesses incur when required by the court to remain in a city for a period of days. Such opinion indicates that witnesses would be entitled to normal per diem pay for the period of days within which they were required to remain in the city even though such witnesses were not utilized during such period. It would logically follow that if the court, rather than requiring a witness to remain in the vicinity of the court, requires such witness to return home during an intervening period in which he is not used, such witness would be entitled to mileage for the additional trip.

It is apparent that where there is an intervening day in which a witness is not to be used, such witness must either remain in the vicinity of the court or return home. As demonstrated, if the court orders either of these results, the witness is entitled to the statutory compensation of either mileage if he returns home or per diem if he remains in the locale of the court. It is not just that the witness' right to either of these compensations be circumvented when a court makes no order as to whether a witness is to remain in the locale or to return home, because necessity dictates that one of these must occur whether the court so orders or not.

The proper procedure, therefore, is that when a witness is entitled to either mileage to his home or per diem during an intervening day of a particular suit, in which such witness is not to be used, the witness would be entitled to mileage if the court had ordered his return home and to per diem if the court ordered him to remain in the locale. If the court makes no order whatsoever, the witness should anticipate that if the order had been rendered, it would have been for the lesser rate and should expect compensation only for such lesser rate.

Your question is answered accordingly.

061-94—June 7, 1961

HOUSING AUTHORITIES LAW
EXPENDITURES AND AUTHORITY OF PANAMA CITY
HOUSING AUTHORITY—§§421.04(1), 421.05, 421.07,
421.08, 421.14, F. S.

To: *James D. Godwin, Chairman, Panama City Housing Authority,
Panama City*

QUESTIONS:

1. Are the commissioners of the Panama City housing authority obligated to resign as commissioners of the housing authority upon the request of the mayor or other appropriate city officials?
2. Were the contributions and loans for civic activities within the municipality as listed on the attachment to your recent letter authorized expenditures for the housing authority?

AS TO QUESTION 1:

Section 421.04(1), F. S., authorizes the creation of housing au-

thorities and provides in part, "In each city (as herein defined) there is hereby created a public body corporate and politic to be known as the "housing authority" of the city; ..." (Emphasis supplied.) Section 421.05, F. S., provides that after the housing authority is established the mayor shall, with the approval of the city commission, appoint five persons as members of the housing authority commission for *staggered terms*. Section 421.07, F. S., apparently provides the only method of removal of a housing authority commissioner and provides that such removal shall be "for inefficiency or neglect of duty or misconduct in office." Section 421.08, F. S., provides that a housing authority "shall constitute a public body corporate and politic, exercise the public and essential governmental functions set forth in this chapter and having all the powers necessary or convenient to carry out and effectuate the purposes and provisions of this chapter including the ... powers ... to sue and be sued; ... make and execute contracts and other instruments ... acquire, lease and operate housing projects; ... to acquire by the exercise of the power of eminent domain real property; issue subpoenas" and do other things necessary in connection with the operation of a housing authority. Section 421.14, F. S., further provides that the debts (debentures) of a housing authority, if they shall so state, shall not be a debt of the city or any other political subdivision.

Legislative intent is the pole star by which we must be guided in construing the acts of the legislature (*Ervin v. Peninsular Tel. Co.*, Fla., 53 So. 2d. 647, *Smith v. Ryan*, Fla., 39 So. 2d. 281, and *Fla. State Racing Com. v. McLaughlin*, Fla., 102 So. 2d. 574).

It would seem that if the legislature had intended for the housing authority commission to serve at the pleasure of the municipal governing body it would have so provided in the housing authority act and given some special authority to the mayor or other appropriate municipal officials to request the resignation of the members of the housing authority commission. Furthermore, it would seem that had this been the intent of the legislature they would have provided that the terms of the housing authority commissioners be concurrent with the mayor and other members of the municipal governing body rather than providing for staggered terms as it did in §421.05, F. S. In addition, it is doubtful that the legislature would have provided specific reasons for removal as it did in §421.07 had it been the legislative intent that the housing authority commissioners be removed at the will of the municipal governing body.

These observations coupled with the fact that municipal housing authorities are, under the provisions of §§421.04 and 421.08, F. S., created as separate public bodies corporate and politic with the authority to exercise governmental functions including the power of eminent domain and the fact that the debts (debentures) of the housing authority are, when so provided, not to be considered debts of the municipality (§421.14, F. S.), leaves this office inclined toward the position that the members of the housing authority commission are not obligated to resign upon the request of the mayor or other appropriate municipal officials unless said request alleges inefficiency, neglect of duty or misconduct in office, at which time said request for removal should be submitted in accordance with the provisions of §421.07, F. S., providing for appropriate notice and hearing.

Accordingly, question 1 is answered in the negative.

AS TO QUESTION 2:

During the second world war the U. S. government caused to be established an active shipyard in Panama City. This necessitated the construction and operation by the appropriate U. S. agency of a large housing project near the shipyard. Thus, the housing authority of Panama City was created pursuant to Ch. 421, F. S. An application was submitted to the public housing administration for a reservation of 200 units of urban low-rent public housing which was subsequently granted. In the same year, 1950, public law 475-81st congress, known as the Lanham act, was passed. This act dealt with the disposition of temporary war housing which had been erected in various communities of the nation. In brief, the act granted rights to certain agencies to acquire such housing for local housing authorities where named in the congressional act as eligible transferees. Following the passage of the Lanham act the Panama City housing authority adopted a resolution requesting the U. S. to transfer certain of the housing facilities to it to be continued as low-rental housing projects operated by the Panama City housing authority. The resolution was adopted pursuant to the provisions of §601(d) of title VI, of the Lanham act, 42 USCA, §1521, et seq., under which the Panama City housing authority committed itself to continue the operation of the housing project to be acquired by it. Thereafter the federal government did relinquish to the Panama City housing authority certain temporary war housing projects, the majority of which were allegedly found to be in a state of disrepair and thus the projects were put up for sale under the disposal provisions of the Lanham act. The cost to the housing authority of this temporary housing was restricted to the federal government's acquisition cost of the land and value of this property in the early 1940's was rather nominal as compared with the value of the improved property some 10 years later and thus there were substantial profits when the property was disposed of which came more or less as a "windfall" to the housing authority and apparently the U. S. attorney filed suit on behalf of the government alleging that these "windfall" profits should be returned to the federal government rather than remain with the housing authority and under an order of the U. S. district court in and for the northern district of Florida, dated Nov. 5, 1954, \$24,969.56 was paid to the treasury of the U. S., plus cost and attorneys fees. Apparently, however, this sum did not represent the greatest portion of the "windfall" profits for according to the letter of inquiry approximately \$120,000 remained to the credit of the Panama City housing authority and to this date approximately \$100,000 of this amount has been channeled to community enterprises such as construction of a youth center building, establishment of a bayfront wayside park, boy scouts and girl scouts, salvation army, junior chamber of commerce, police pistol range, united cerebral palsy, child guidance and retarded children's clinics, and other similar community and civic organizations and undertakings. It is the expenditures for these purposes just mentioned that give rise to the question 2 presented herein.

At the outset there is some question in the mind of the writer as to how the housing authority came by this "windfall" in the first instance in the light of the provisions of public law 475, §606(c), (1), 42 USCA 1586(c) (1), which contains the following proviso:

Provided, that if at any time during such period the public housing agency and the administration agree that the proj-

ject, or any part thereof, is no longer suitable for use as low-rent housing, the project, or part thereof, shall with the approval of the administration be sold by the public housing agency after which the agreement shall be deemed to have terminated with respect to such project or part thereof except that *the proceeds from such sale, after payment of the reasonable expense thereof, shall be paid to the administration; . . .* (Emphasis supplied.)

Notwithstanding the provisions of the above quoted federal statute it is assumed in the light of the litigation mentioned above (U. S. of America v. Panama City Housing Authority, Case 3832-M-Civil) that the funds were rightfully left with the Panama City housing authority and hence further discussion will be limited to the disposition of said funds.

A review of the housing statutes from the U. S. housing act of 1937 reveals that the local housing authorities entered into agreements with the administration (federal government) to collect rents, etc., a portion of which were to be remitted to the federal government to reduce the indebtedness of the local housing authority to the federal government. A review of the records in this instance suggests that at the time the Panama City housing authority was a recipient of the "windfall" that an indebtedness in favor of the federal government did exist and apparently some indebtedness to the federal government on behalf of the Panama City housing authority still exists today. It would, under the provisions of the federal housing authorities act as well as the Florida housing authorities law seem to have been more appropriate to use any surplus funds for the purpose of improving the housing authority projects, reducing the cost of housing authority facilities to the tenants, or if this be inappropriate, then the next logical step would appear to have been to reduce the amount of the indebtedness to the federal government. While the contracts between the housing authority and the federal government are not available here for review by this office it is difficult to concede why such funds could not have been applied to reduce the cost of the indebtedness to the federal government. It is interesting to note, however, that in 1959 the federal government took specific steps to permit the commingling of Lanham act and low-rent project funds and residual receipts for the reduction of federal annual contribution contracts. (See PL 86-372, §807, amending §606(2) of the housing act of 1940 (US Code Congressional and Administrative News 1959, vol. 1, p. 776, US Code Congressional and Administrative News 1959, Vol. 2, p. 2870, 42 USCA 1586(c) (3)). There is some implication in this act that perhaps the previous use of funds from one housing authority project might not have been available in order to make re-imbursement to the federal government on the indebtedness of another project and while this does not seem logical, perhaps this is the reason that the "windfall" funds were not so used. Nonetheless, the primary question with which we are concerned here relates to the spending of the "windfall" funds for the civic and community endeavors and projects previously mentioned.

It appears from the file that the community and civic projects to which the housing authority contributed were all worthwhile community activities and there appears *not* to be the slightest suggestion that there were any underlying or hidden motives connected with the contributions which would suggest a fraudulent handling of the funds and furthermore should private individuals or organizations have made similar contributions to these same com-

munity undertakings they would undoubtedly have been lauded for their activities. In reviewing the applicable federal statutes and provisions of the Florida law this office has not, however, uncovered any authority, specific or implied, which would suggest that the *public funds* which were at the disposal of the housing authority should have been available for such community purposes. In *Lewis v. Peters*, Fla. 66 So. 2d. 489 at 493, a case involving the Panama City housing authority, the Florida supreme court held that the Panama City housing authority commissioners had no authority to turn realty over to private interests for the development of low-rent housing projects even though such a transaction might be most laudable and desirable. Extending this theory one step further it would seem to follow that the housing authority likewise had no authority to turn cash assets over to private organizations as was done here even though the results may have been most praiseworthy and desirable. As suggested above, it would appear from the provisions of the applicable state and federal laws that the money should more appropriately have been used to reduce the amount of the indebtedness to the federal government, to improve the housing authority facilities, reduce the cost of the low-rental housing to the individual tenants, or invested as provided for in §421.08 (5), F. S.

It is possible that the \$15,000 secured loan to the Panama City women's club and the \$20,000 loan to the Millville civic development club may have been prudent investments which would fall within the provisions of §421.08, F. S. However, since there was no opportunity for a return on the investment of the other \$60,000 contributed to the various civic, educational and community development organizations of the city, it would not seem that these gifts could possibly fall within the provisions of §421.08(5), F. S., or any other applicable section of the state or federal statutes. Thus, while the motives and intent were undoubtedly of the highest type there appears to be serious question as to the validity of such expenditures. It is interesting to note that the contributions by the housing authority for the civic purposes mentioned herein were never questioned by the federal auditors during their annual reviews of the housing authority books and there is no known desire on the part of any agency to recoup the \$60,000 in question. These facts in and of themselves would at this point appear to constitute additional mitigating factors. Nonetheless this office would be inclined toward the position that the commissioners of the Panama City housing authority should refrain from making such contributions in the future.

Accordingly question 2 is answered in the negative.

061-95—June 7, 1961

**COUNTY OFFICERS—COUNTY ORGANIZATION
USE OF COUNTY-OWNED MOTOR VEHICLES—COUNTY
COMMISSIONERS—§125.161 (4), F. S.—CHS. 27221,
1951, 61-1338, Laws of Florida**

To: *Bryan Willis, State Auditor, Tallahassee*

QUESTIONS:

1. In the absence of special or local legislation, is a board of county commissioners authorized to furnish county-owned motor vehicles for the exclusive use of a member of such board?

2. In addition to the monthly travel allowance provided by §2, Ch. 27221, Laws of Florida, 1951, may a member of the board of county commissioners be reimbursed for expenditures in connection with

- (a) travel on county business outside the county?
- (b) purchase of gasoline, oil and repairs for a county-owned motor vehicle assigned to and used by said member?

AS TO QUESTION 1:

In AGO 044-200, an opinion of my predecessor in office, appearing at p. 183 of the 1943-44 biennial report of the attorney general, it was held that where the legislature had prescribed mileage allowances for travel in connection with county business, such allowances were intended to be in lieu of motor vehicles and that the county commissioners would be unauthorized to purchase motor vehicles for their use in inspecting roads, bridges, and other county public works.

Your attention is directed to §125.161(4), F. S., which provides:

- (4) This section shall not be construed to repeal, affect or modify the provisions of any law *relating to expenses allowance to county commissioners*, nor relating to payment of extra compensation to the chairman of any board of county commissioners, nor relating to expenses of county commissioners incurred on trips outside the county on county business, *nor relating to furnishing a car or cars for the use of any board of county commissioners*, or the members thereof, nor to affect, repeal or modify the provisions of any law relating to the compensation of county commissioners passed by the 1955 or 1957 sessions of the Florida legislature. (Emphasis supplied.)

Said subsection is a savings clause intended to preserve prior laws pertaining to the subject matter designated therein. In preserving laws relating to furnishing a car or cars for the use of any board of county commissioners, it would appear that the legislature has again considered that problem and indicated that in the absence of an act of the legislature authorizing the furnishing of cars for the use of boards of county commissioners, there exists no present authority for motor vehicles being furnished to the boards of county commissioners or individual members thereof.

Question 1 is answered in the negative.

AS TO QUESTION 2(a):

Section 2 of Ch. 27221, 1951, a general act of limited application (population act), applying to counties having a population of not less than 23,625 nor more than 24,000 inhabitants according to the latest official census, provides as follows:

Section 2. That in addition to the compensation provided in section 1 hereof the said members of the board of county commissioners having population as aforesaid shall each receive the fixed sum of fifty dollars per month for expenses incurred in and about the performance of their necessary duties as such board member.

Thus, the legislature appears to have limited counties coming within the designated population bracket to the extent that members of the board of county commissioners of such counties are entitled to receive not more than \$50 per month for all expenses incurred in and about the performance of any and all necessary duties as

such board member. It does not appear that the limitation of said section is applicable to only those expenses incurred by members of the boards of county commissioners for their activities within their particular county. Question 2(a) is answered in the negative. AS TO QUESTION 2(b):

Inasmuch as §2 of Ch. 27221 contemplates the fixed sum of \$50 per month to be paid to members of the boards of county commissioners in certain counties, it would appear that on receipt of such funds, the members of the board of county commissioners could spend that amount for expenses of any kind which they incur in connection with the performance of their necessary duties.

In view of the answer to question 1, there would be no need for the county commissioners to purchase gasoline and oil and maintain a county-owned motor vehicle assigned to them from the \$50 monthly expense allowance.

Question 2(b) is answered accordingly.

It is assumed from your letter of inquiry that certain practices in connection with the use of county-owned motor vehicles by members of the board of county commissioners have come to your attention. It appears from the examination of laws relating to such matters that if those practices are to be continued it would be advisable that legislation be secured to provide proper authorization for this type of expenditure by the counties.

Your attention is also invited to the provisions of Ch. 61-1338, which as of its effective date, viz., May 22, 1961, repealed Ch. 27221, 1951.

061-96—June 8, 1961

**COUNTY OFFICERS—COUNTY ORGANIZATION
TRAVEL EXPENSES—COUNTY JUDGE SUMMER SCHOOL
OF ALCOHOL STUDIES—§145.02, F. S., 1951.**

To: *Bryan Willis, State Auditor, Tallahassee*

QUESTION:

May the travel expenses of a county judge incurred in attending the Yale summer school of alcohol studies be considered an expense of said county judge's office?

Section 145.02, F. S., 1951, defines net income of a county fee office as a residue of the income from such office after deducting all reasonable expenditures for the salaries of clerks and assistants and the necessary expenditures for the proper operation of said office.

It is well settled that expenses incurred in attending conventions or meetings not for a public purpose may not be allowed. (43 Am. Jur., Public Officers, §368. This office has repeatedly considered questions concerning the validity of expenses of county officers attending association meetings as office expense (AGO 052-244, 053-268, 055-285, 056-178, 058-15 and 058-89) and has generally approved the same since such meetings appear to further county purposes.

In some instances short courses of a clinical nature at institutions of higher learning directly designed to better familiarize groups of officials with their functions and duties and subject matters with which they deal have been sanctioned because it appeared the instruction offered was directly related to the official duties and was made available to the group as a whole. It is my understanding

that the Yale summer school of alcohol studies is a course offered in the regular summer school curriculum of that institution as distinguished from a training course intended to guide members of the judiciary in the handling of problems involving the use of alcohol which come before them. It appears to me that the benefit to the county which would be derived from training of this nature is too remote and incidental to be considered as authorizing the traveling expenses of a county judge attending such school to be charged as an expense of the operation of his office, particularly in the absence of statutory authority expressly or impliedly authorizing a county judge or other county official to take the course.

061-97—June 16, 1961

LEGISLATION

CONSIDERATION BY LEGISLATURE AT SPECIAL SESSION
OF ACT PASSED AT REGULAR SESSION AND VETOED
BY THE GOVERNOR—§§2, 28, ART. III, §§8, 11, ART.
IV, STATE CONST.

To: *Farris Bryant, Governor of Florida, Tallahassee*

QUESTION:

May legislative enactments of the 1961 session, vetoed by me as governor, be considered by the legislature at a special session held before the next regular session in 1963?

It is assumed that your inquiry is based upon bills vetoed by the governor subsequent to the adjournment of the legislative session which are required to be filed with the secretary of state together with the governor's objections. It is also a constitutional responsibility of the secretary of state to present such bills to "the legislature at its next session and if the same shall receive two-thirds of the votes present, it shall become a law." (§28, Article III, State Const.)

Section 2, Art. III, State Const., provides the formula whereby members of the legislature may call that body into extra session. Once convened, pursuant to such authority, it would appear that the legislature is empowered to consider all things as if convened in regular session. If the legislature is convened in extra session pursuant to §8, Art. IV, State Const., by proclamation of the governor, its power to act would be limited to the purpose for which it had been convened as appeared in the governor's proclamation, except the legislature could in such session by two-thirds vote of each house consider other matters.

It does not appear that the question presented by your inquiry has received the consideration of the Florida judiciary. However, in re advisory opinion to the governor, 59 So. 786, 64 Fla. 21, dated Sept. 28, 1912, Governor Gilchrist was advised by the Florida supreme court that, although the provisions of §11, Article IV, State Const., required the governor at the beginning of every session to communicate to the legislature every case of fine or forfeitures remitted, or reprieve, pardon, or commutation granted, stating the name of the convict, the crime for which he was convicted, the sentence, its date, and other information, the language of said section referred to the regular sessions of the Florida legislature as distinguished from special sessions.

Based upon said advisory opinion, my predecessor in office ad-

vised the Honorable Spessard L. Holland, then governor, that while veto messages were not specifically mentioned in said advisory opinion, that the opinion referred to all communications and logically included veto messages. (AGO 044-158, attorney general's biennial report, 1943-1944, dated June 6, 1944, p. 96.)

In addition, it is my understanding that the secretary of state as a matter of long-standing custom, based upon the construction of §28, Art. III, State Const., given that section by that officer, has refrained from laying before the Florida legislature, convened in other than regular session, legislative enactments which have been vetoed by the governor subsequent to the adjournment of a prior regular session.

In view of the above-cited authorities and customs, it is my opinion that legislative enactments of the 1961 session, vetoed by you as governor, would not normally be presented to the legislature convened in extra or special session prior to the 1963 regular session. However, there is some doubt that the legislature convened in extra or special session would be precluded from considering bills which had been vetoed by the governor by its own action under the provisions of §2, Art. III, or the exception as appears in §8, Art. IV, State Const.

061-98—June 20, 1961

TAXATION **COMPUTATION OF TAX ON STOCK TRANSFERS UNDER** **§201.04, F. S.**

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Should the tax imposed by §201.04, F. S., be imposed upon the certificates surrendered to the transfer agent, by the transferor or transferors, or upon the new certificate issued to the transferee?

Section 201.04 was derived from Ch. 15787, 1931. A comparison of said chapter 15787 with §807 of the federal revenue act of 1924 reveals that said Ch. 15787 was taken largely and substantially from the said §807 of the federal act of 1924. Said §201.04 is substantially the same as paragraph numbered "3" of schedule "A" of said federal §807. Section 201.04, having been taken from and being substantially similar to the said federal enactment on the same subject, takes the same construction as has been given to the federal act by the federal courts (*State v. Cook*, 108 Fla. 157, 146 So. 223, text 224; *Gay v. Inter-County Tel. and Tel. Co. Fla.*, 60 So. 2d 22, text 23).

Our question stated above is substantially the same as the one posed by the circuit court of appeals of the U. S., 9th circuit, in *Transamerica Corp. v. Lewis, Collector*, 126 Fed. 2d 402, involving a like question under the said federal revenue act of 1924, in which case the court said that "the deliveries of the certificates by the appellant to the respective transfer agents were not in themselves transfers; if they were, those deliveries would have been taxable as transfers. These transfer agents were, of course, simply conduits, availed of for cancelling the certificates surrendered and issuing the shares actually transferred on to the respective transferees. Until the shares were either actually or constructively received by the transferees, the transfers were incomplete." The

stockbrokers had no right, title or interest in the stock other than as agents of the owners for a specific purpose, that is, selling the same for the account of their customers.

In *North American Co. v. Green*, Fla., 120 So. 2d 603, text 609, the court referred to *Transamerica Corp. v. Lewis*, saying that "there one corporation owned a substantial part of the capital stock of two subsidiary corporations. The parent corporation surrendered the stock in the two subsidiaries with directions to reissue the same to the stockholders of the parent corporation in proportion to their stock holdings. The circuit court of appeals held that the transaction constituted a transfer of the stock of the subsidiaries, that the transfer became complete only when the stock ultimately reached the transferee stockholders, and that the tax would be determined on the basis of denominations of the certificates by each transferee rather than on the basis of the limited number of certificates assigned by the transferor to the parent corporation. . . . The transaction, however, is not complete until the title to the subject matter of the transfer reaches the transferee. Inasmuch as the transferee is a necessary party to the completion of the transfer then the measure of that which is transferred must be that which is received by the transferee."

Mr. Justice Cardozo, writing for the court in *Lee v. Bickell*, 292 U.S. 415, 54 S. Ct. 727, 78 L. ed. 1337, text 1341, stated that the scheme of the Florida "statute is to tax the transfer of the shares of stock, whether executory or executed, by stamps to be affixed to those writings, and those only, which in a practical sense are the repository of the agreement or the instruments or vehicles for the ensuing change of title. Thus, if a transfer has been made and the only evidence of its making is on the books of the corporation, it is on such books and nowhere else that the stamps are to be placed. The statute does not say or mean that they shall be placed also upon the memoranda of the transaction in the office of the brokers or that there shall be an election to affix them either at one place or the other. Again, 'if the change of ownership is by transfer of the certificate' to a stated assignee, it is on the certificate and nowhere else that the stamps are to be placed. Only in two classes of cases is a different rule prescribed. 'In case of an agreement to sell' (as distinguished from an executed transfer) 'or where the transfer is made by delivery of the certificate assigned in blank,' then a memorandum is required, which is to be stamped." We find no other rule established by the Florida courts construing the same statute.

Your file seems to present a case where a customer of a stock broker, bank or similar agency, receives an order from one of its customers for the purchase of a stated number of shares of stock in a specified corporation, which may or may not be located or doing business in this state. Unless such broker, bank or other agency holds title to a sufficient number of shares of such stock in its inventory, the usual procedure is for it to obtain the same from other brokers, banks or other agencies, who may or may not be located within this state, who may themselves obtain the same from other brokers, banks, agencies, or the actual owners of such stocks. Such other brokers, banks or other agencies deliver such stocks to the local broker, bank or agency for delivery to the customer. Where such stock is obtained by the Florida bank, broker or agency for delivery to its customer through a stock exchange, the procedure involved is set out in detail in *Lee v. Bickell*, *supra*. Whether the transaction between the "customer's" bank, broker or other agent

was carried on through a stock exchange or otherwise, or the stock was obtained from out of state owners, would seem to have some bearing upon the answer to the question, as will also the nature of the transaction with the said customer. Whether the stock was sold to the customer by the bank, broker or other agent, or the transaction was one of a purchase as agent for the customer, will also make a difference in the question of liability to taxation. Transactions completed out of the state do not seem to be subject to Florida taxation (*Lee v. Bickell*, supra); however, transactions completed within the state so as to constitute a Florida transaction are subject to the tax.

We are, therefore, of the opinion that the usual transaction within the purview of the above question will constitute a transfer upon the books of the corporation, where that evidence "is shown only upon the books of the corporation," so that the tax would be upon the certificate issued to the transferee. However, this may, depending upon the facts in each case, not be the only taxable transaction taking place in this state in connection with the transaction. Should the bank, broker or other agent above mentioned, in order to obtain the stock for delivery to its customer, purchase the stock in this state for his or its own account, and by independent transaction sell the same to the customer, there would seem to be an intervening taxable transaction, but where they are merely acting as broker or agent between their customer and the owner of the stock, there would be no further transaction. The facts in each transaction determine the taxable transactions in that connection.

061-99—June 23, 1961

CRIMES

ISSUANCE OF WORTHLESS CHECK IN PAYMENT OF PRE-EXISTING DEBT—§§832.05(2), (3), 775.06, 775.07, F. S.; CH. 61-284, LAWS OF FLORIDA

To: *William D. Hopkins, State Attorney, Tallahassee*

QUESTION:

In the light of the opinion of the 3rd district court of appeal in *Harris v. State*, 123 So. 2d 752, does a person commit a criminal offense when he knowingly gives a worthless check in payment of a pre-existing debt?

Section 832.05(2), F. S., makes it unlawful to give a worthless check even though nothing of value is obtained in exchange for it. In the case of *State ex rel Shargaa v. Culver*, 113 So. 2d 383, the supreme court of Florida held that one who violates said §832.05(2) by giving a worthless check without receiving anything of value in exchange therefor is guilty of a misdemeanor punishable under §775.07, F. S. (§775.07 authorizes a fine not exceeding \$200 or imprisonment not exceeding 90 days, and since said section does not specify the place of imprisonment, §775.06, F. S., requires that it be served in the county jail.)

Section 832.05(3), F. S., makes it unlawful to obtain any services, goods, wares or other things of value by means of a worthless check. The Florida supreme court applied this statutory provision in the case of *Penrod v. Cochran*, 123 So. 2d 334, and held that if a person obtains property of value of less than \$100 in exchange for a worthless check, he is subject to the penalties provided by law for petit larceny (imprisonment in the county jail not exceeding 6

months or fine not exceeding \$300) and that if the value of the property obtained by such person in exchange for the worthless check is \$100 or more, he is subject to the penalties for grand larceny (imprisonment in the state prison not exceeding 5 years or in the county jail not exceeding 12 months, or fine not exceeding \$1,000).

The law thus laid down in the Shargaa and Penrod cases is still the law of this state.

I find nothing in the opinion of the 3rd district court of appeal in *Harris v. State*, 123 So. 2d 752, which even hints that a person commits no crime when he knowingly gives a worthless check without obtaining anything of value in exchange for it. On the contrary, the opinion in that case quotes §832.05(3) and then goes on to say:

Section 832.05 (2) makes it unlawful to issue a worthless check without obtaining anything of value in exchange.

These two subsections therefore differ in one major aspect in that §832.05(3) condemns, in addition to the issuance of a worthless check, the obtaining of services, goods, wares or other things of value by means of the check. . . . (Emphasis supplied.)

Also, the opinion in the *Harris* case cites the *Shargaa* and *Penrod* cases, *supra*, as authority and thereby recognizes the principles therein laid down to be the governing law.

Harris was charged under §832.05(3) (not under §832.05(2)) with obtaining merchandise of the value of more than \$100 in exchange for a worthless check and the 3rd district court of appeal reversed his conviction for the sole reason that the proof did not support the charge, since the proof showed that *Harris* obtained nothing in exchange for the check, it having been given for a pre-existing debt.

It is true that the italicized portions of the following quotation from the *Harris* case have been construed by some as a holding by the 3rd district court of appeal that it is not a crime to give a worthless check to pay a pre-existing debt and that additional legislation would be required to make it a crime, to wit:

. . . Although the information here charged that the appellant obtained "merchandise" of the value of more than \$100 by means of the issuance of a worthless check, it nevertheless developed from the testimony at trial that the check given in the sum of \$338.48 was for the purpose of paying a pre-existing debt incurred by the appellant with the state's prosecuting witness, Johnson. Obviously, the testimony did not support the charge in the information because it failed to establish an essential element of the crime, i.e., obtaining services, goods, wares or other things of value by means of the check. *It has generally been held under similar circumstances, that the payment of a pre-existing debt by worthless check does not come within the ban of those statutes prohibiting the intentional making, drawing, uttering or delivering of checks not supported by funds or credit and thereby obtaining something of value.* See Perkins, Criminal Law, 270 (1957) and annotation 59 A.L.R. 2d 1159. It appears in this instance that the appellant did not obtain anything of value by means of the check, nor did the prosecution's witness, Johnson, part with anything of value upon the strength of the check. Under this state of the proof, the trial judge was in error in refusing to grant the directed verdict at the conclusion of the state's

case. *It may be that the statute under which prosecution here was attempted is inadequate to cover the practical aspects of such transactions; nevertheless, that would be a matter for legislative rather than judicial remedy.* (Emphasis supplied)

However, I do not think that such a construction is justified. When the 3rd district court of appeal said:

... It has generally been held under similar circumstances, that the payment of a pre-existing debt by worthless check does not come within the ban of those statutes prohibiting the intentional making, drawing, uttering or delivering of checks not supported by funds or credit and thereby obtaining something of value." (Emphasis supplied.)

the court meant exactly what it said, that is, that it has generally been held that the payment of a pre-existing debt by worthless check does not come within the ban of "... statutes prohibiting the intentional making, drawing, uttering or delivering of checks not supported by funds or credit and thereby obtaining something of value." All that the court was saying was that the giving of a worthless check for a pre-existing debt does not come under a statute which prohibits (1) the intentional giving of a worthless check (2) "and thereby obtaining something of value." Quite so, but that is far from saying that the giving of a worthless check for a pre-existing debt is not a crime under a statutory provision like §832.05 (2), which does not require the obtaining of something of value. When the court made that statement, it was referring to such statutes as §832.05(3), which does require the obtaining of something of value in exchange for the worthless check.

Whatever the 3rd district court of appeal may have meant when it made the following statements in the Harris opinion:

... It may be that the statute under which prosecution here was attempted is inadequate to cover the practical aspects of such transactions; nevertheless, that would be a matter for legislative rather than judicial remedy.

it is certain that the court did not say, and I see no reason to think that it meant to imply, that there is no statute under which a person can be prosecuted for giving a worthless check for a pre-existing debt. If the court had meant to throw out such an implication, it would not have stated, as above shown, that "section 832.05(2) makes it unlawful to issue a worthless check without obtaining anything of value in exchange," and it would not have approvingly cited the Shargaa case, in which the supreme court held that Shargaa was guilty of a misdemeanor under §832.05(2) and subject to punishment under §775.07 for giving a worthless check without obtaining anything of value in exchange.

I call attention to the fact that Ch. 61-284, 1961, which provides that it shall become effective on July 1, 1961, amends the penalty provisions of §832.05. However, it leaves in effect what is now §832.05(2) and therefore the pronouncements of the supreme court in the Shargaa case, *supra*, will continue to be applicable after said Ch. 61-284 goes into effect on July 1.

In conclusion, it is my opinion that a person commits a criminal offense when he knowingly issues a worthless check for a pre-existing debt, and this will still be the law after Ch. 61-284 goes into effect on July 1, 1961. Your question is therefore answered in the affirmative.

061-100—June 23, 1961

SHERIFFS

AUTHORITY AND RESPONSIBILITY TO PERMIT VISITATION OF PRISONERS—SERVICE OF PROCESS—§901.24, F.S.

To: J. W. Dunn, Sheriff, Brevard County, Titusville

QUESTIONS:

1. What is the authority of the sheriff in regard to regulating the time when lawyers may be permitted to interview prisoners committed in the county jail?

2. What is the responsibility of the sheriff in regard to the time within which civil process should be served?

AS TO QUESTION 1:

Some years ago my predecessor in office commented on the right of a prisoner to be interviewed by his attorney and stated:

Under the laws of Florida the sheriff is in exclusive charge of all prisoners lawfully committed to the county jail, subject, of course, to the *right* of the judge of the court having jurisdiction of the prisoner to have the prisoner brought before his court, and an attorney would have no authority to make any unreasonable demand with reference to interviewing a client who was in jail.

Every citizen when charged with crime has a right to confer with his counsel, but the sheriff could require that such conference or interview should be at *reasonable times and under reasonable conditions*. . . (Biennial report of the attorney general, 1931-1932, p. 756, May 9, 1931)

The legislature thereafter enacted §901.24 which provides as follows:

901.24 *Right of attorney to visit person arrested.*—

Any attorney at law entitled to practice in the courts of this state shall, at the request of the person arrested or of some one acting in his behalf, be permitted, forthwith upon his request, to visit the person arrested and to interview him privately.

The exercise of this statutory right should not be restricted by technical or unreasonable rules or regulations which would materially curtail its immediacy and effectiveness. However, the sheriff or jailer has practical problems to consider in supervising such visitations, which would give him a reasonable discretion in determining orderly procedures for the same. Accordingly, he would be authorized to take into consideration such factors as: the circumstances in each particular case bearing in mind the rights of the accused and the possible harmful effects from failure to observe the command of the statute which could result in a denial of due process; the efficient and orderly operation of the jail or other place of detention, and the critical circumstances surrounding an arrest and incarceration. In no event should any specific set of hours be rigidly fixed so as to preclude the accused's right to visitation by counsel as provided by statute. There *may* be exceptional circumstances which would preclude an immediate visitation by counsel of an accused, but *ordinarily* this would *not* appear to be the case. Under circumstances which would endanger the safety of the accused or of other prisoners it would appear that the sheriff or jailer could reasonably delay a visitation.

It should be noted in this regard that the supreme court of

the U. S. has held that refusal of an accused's request to confer with counsel prior to his trial may constitute a denial of due process of law, where the accused is so prejudiced thereby as to infect his subsequent trial with an absence of that fundamental fairness essential to the very concept of justice. (*Crooker v. California*, 357 U.S. 433, 2 L. ed. 2d 1448, 78 S. Ct. 1287; see also 2 L. ed. 2d 1644, et seq.)

AS TO QUESTION 2:

Prior to its repeal in 1951, §47.11, F. S., provided that process should be served at least 10 days before the rule day to which it was made returnable. At the present time, I am not aware of any statutory provision or rule of procedure that specifies with particularity when process should be served after it is placed in the hands of the sheriff.

Generally speaking, it is the duty of the sheriff to execute process with the utmost expedition or as soon as the nature of the case will permit (47 Am. Jur., *Sheriffs*, §54, note 15, p. 863). Where process is placed in the hands of the sheriff, service should be made at the *earliest practical moment* and within a *reasonable time* after he receives it. However, where a sheriff has knowledge or reasonable ground to believe that damage will result from his delay, it would be his duty to execute the process immediately. (See 80 C.J.S., *Sheriffs*, §44, p. 216). An unreasonable delay or a disregard of special circumstances could possibly render the sheriff liable for damages occasioned by his failure to proceed more promptly.

I hope that the above statements have been helpful in answering your specific inquiries.

061-101—June 29, 1961

INSURANCE

AUTOMOBILE LIABILITY INSURANCE POLICIES—ISSUED FOR DELIVERY OR DELIVERED PRIOR TO JULY 1, 1961—EFFECT OF ENACTMENT OF CH. 61-175, LAWS OF FLORIDA (§627.0851, F. S.)

To: J. Edwin Larson, State Treasurer and Insurance Commissioner, Tallahassee

QUESTION:

Do the provisions of Ch. 61-175 require that all automobile liability insurance policies, including renewals of such policies, delivered or issued for delivery prior to July 1, 1961, which have an effective date subsequent to July 1, 1961, provide coverage against liability arising from the operation of a motor vehicle by an uninsured motorist?

Chapter 61-175, adding §627.0851 to the Florida Statutes, among other things provides in part that:

(1) No automobile liability insurance, covering liability arising out of the ownership, maintenance, or use of any motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto, ... for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease,

including death, resulting therefrom; provided. . . .

Said chapter, by §2 thereof becomes effective July 1, 1961.

The section of said chapter above set forth, being clearly regulatory in nature, is to be strictly construed (*Nolan v. Moore*, 88 So. 601, 81 Fla. 594; *Brown v. Watson*, 156 So. 327, 116 Fla. 56; *Florida Indus. Com. v. Manpower, Inc. of Miami*, 91 So. 2d 197).

It is also well settled that laws are not to be given a retrospective application unless there is clearly a legislative intent that they be so applied. *State ex rel Riverside Bank v. Green*, 101 So. 2d 805; *Larson v. Independent Life and Accident Ins. Co.*, 29 So. 2d 448, 158 Fla. 623; *State ex rel Bayless v. Lee*, 23 So. 2d 575, 156 Fla. 494.

It is my opinion that policies of automobile liability insurance issued for delivery or delivered prior to July 1, 1961, notwithstanding such policies may become effective subsequent to July 1, 1961, are not subject to the above designated provisions of Ch. 61-175.

061-102—June 29, 1961

PUBLIC RECORDS

CONSTRUCTION OF §119.01, F. S., PROVIDING FOR INSPECTION OF PUBLIC RECORDS—MAPS, PLATS, MEMORANDA, CARDS, ETC., USED BY TAX ASSESSORS—§193.17, F. S.

To: *John R. Jones, Jr., County Tax Assessor, Pensacola*

QUESTION:

What records, maps, plats, cards and other memoranda, or writings, used by a tax assessor when preparing and extending his tax roll, are deemed to be records within the purview of §119.01, F. S.?

The right to inspect public records existed at common law, and in the absence of a controlling statute, such right is still governed by common law (76 C. J. S. 133, §35; 45 Am. Jur. 427, §17). Section 119.01, F. S., provides that "all state, county and municipal records shall at all times be open for a personal inspection of any citizen of Florida." This statute was derived from Ch. 5942, 1909, and seems to have been construed as one referring to *public records* by the court in *Petition of Kilgore, Fla.*, 65 So. 2d 30, text 31; *Fuller v. State*, 154 Fla. 368, 17 So. 2d 607, and *Williams v. State*, 128 Fla. 668, 175 So. 235. We are, therefore, of the opinion that the "state, county and municipal records" referred to in said §119.01, are *public records* of the state and its counties and municipalities. The question, *what are public records*, seems to be presented for determination.

In *Amos v. Gunn*, 84 Fla. 285, 94 So. 615, text 634, the court said that "what is a public record is a question of law. A public record is a written memorial, made by a public officer and that officer must be authorized by law to make it. . . . A public record is one required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said, or done. . . ." In 76 C. J. S. 112, §1, a public record is defined as "one required by law to be kept, or necessary to be kept in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said, or done, or a written memorial made by a public officer authorized to perform that function, or a writing filed in a public office." In 45 Am. Jur. 420, §2, it is stated

that it has been "said that a public record is one required by law to be kept, or necessary to be kept, in the discharge of a duty imposed by law, or directed by law to serve as a memorial and evidence of something written, said or done..." In Black's law dictionary, 4th Ed., p. 1438, a public record is defined as "a record, memorial of some act or transaction, written evidence of something done, or document, considered as either concerning or interesting the public, affording notice or information to the public, or open to public inspection..."

In addition to the above authorities, see also *People v. Harnett*, 226 N.Y.S. 338, text 341; *Robinson v. Fishback*, 175 Ind. 132, 93 N. E. 666, text 669; *People v. Purcell*, 22 Cal. App. 2d 126, 70 P. 2d 706; *State v. Grace*, 43 Wyo. 454, 5 P. 2d 301, text 303; *Steiner v. McMillan*, 59 Mont. 30, 195 P. 836, text 837; *State v. Brantley*, 201 Or. 637, 271 P. 2d 668, text 672 and 673; *Conover v. Board of Education*, 1 Utah 2d 375, 267 P. 2d 768, text 770; *Josefowicz v. Porter*, 32 N. J. Super. 585, 108 A. 2d 865, text 868.

From the above it appears that "a public record, strictly speaking, is one made by a public officer, in pursuance of a duty, the immediate purpose of which is to disseminate information to the public or to serve as a memorial of official transactions for public reference" (*State v. Brantley*, 201 Or. 637, 271 P. 2d 668, text 672 and 673). A public record belongs to the office and not to the officer making it. (*Bell v. Kendrick*, 25 Fla. 778, 6 So. 868, text 869). "Every memorandum made by a public officer is not a public record; papers or memoranda in the possession of public officers which are not required by law to be kept by them as official records, are not public records." (76 C.J.S. 113, §1, notes 14 and 15). "Correspondence of officials relating to private affairs, although in connection with public business, and memoranda of public officers made for their own convenience, even if made at public expense, are not public records unless made so by statute." (76 C. J. S. 113 §1, notes 17-20). "Documents are not to be regarded as public records unless they are made under the sanction of law and official duty." (*Griffiths v. Sanitary Dist.*, 174 Ill. App. 100). Copies of letters written by a forest supervisor, a memoranda made by district ranger in connection with an application for a grazing permit, and a copy of a notice of the application were held not public records in *Steiner v. McMillan*, 59 Mont. 30, 195 P. 836, text 837. In *Coldwell v. Board of Public Works*, 187 Cal. 510, 202 P. 879, text 882, certain estimates, plans, drawings, maps and other data, prepared by an assistant and submitted to the city engineer, for his approval, in connection with a municipal water supply system, were held not to be public records before approval and acceptance by the said engineer.

A record, made by a junior assistant surgeon, connected with a hospital, showing the entry of a person into the hospital, was held, in *Kemp v. Metropolitan Street R.R. Co.*, 88 N.Y.S. 1, text 2, not to be a public record. This record seems to have been in the nature of a memorandum and not a permanent record. In *Burwell v. Teets*, CCA Cal., 245 Fed. 2d 154, text 166, statements made by a prison employee concerning the murder of a prison guard, which were turned over to the coroner to take to his office, were held not to be a public record. In *State v. Sheppard*, 100 Ohio App. 345, 128 N. E. 2d 471, text 499, the work sheets of a technician in the office of a coroner were held not to be public records. In *Welch v. Medlock*, 79 Ariz. 247, 286 P. 2d 756, text 759, a highway department's "fatality sheet" was held not to be a public record within rules of evidence.

In *Stafford v. Shultz*, 42 Cal. App. 767, 270 P. 2d 1, text 10, a physician's report to a state compensation insurance fund was held not to be a public record. In *Tagliabue v. North Bergen Twp.*, 9 N. J. 32, 86 A. 2d 773, text 775, cards prepared by a realty appraisal company, under contract with a township, were held not to be public records, although paid for from tax funds. In *Fritz v. Metropolitan Life Ins. Co.*, 50 Cal. App. 2d 570, 123 P. 2d 622, text 628, it was held that government physician's report to the federal veterans administration was not a public record. Letters written by a state insurance commissioner to an insured (*Kansas City Life Ins. Co. v. Meador*, 186 Okla. 397, 98 P. 2d 20, text 22) and by a fire marshal (*Douras v. Newcomb*, Okla., 267 P. 2d 600, text 604) have been held not public records.

We gather, from the above authorities, that the immediate purpose of a public record is the dissemination of information to the public on the one hand, and the creation of a memorial of official transactions for public reference. For example, a *tax assessment roll* serves the dual purpose of disseminating information (the property assessed, its valuation and the amount of the taxes imposed) to the public, and as a permanent memorial or record of the property assessed, its value for tax purposes, and the amount of the taxes imposed. The tax roll is clearly a public record. The valuations seem to become final upon equalization, although the amount of the taxes imposed is not final until approved by the county commissioners and delivered to the tax collector. The tax roll, or a copy or duplicate thereof, should be made available to the public upon the completion of the valuations so that the public may be advised as to the assessed values fixed by the tax assessor, prior to the equalization hearing and within such time as will permit objections, should objections be desired. Maps and plats, within the purview of §193.17, F. S., including the copies of the government survey plats, appear to be public records within the purview of §119.01, F. S. The maps and plats contemplated by said §193.17 appear to be maps or plats permanent in nature, and not those designed merely for temporary use in the preparation of the annual tax roll, and which are of little, if any, use after the tax roll is completed and delivered to the tax collector.

Preliminary material, whatever its form and nature, designed for use in preparing the tax roll and not as a permanent record, does not appear to constitute public records. Appraisal cards, not designed as permanent but as temporary information in the nature of work sheets, and of little, if any, use in the preparation of *future* tax assessment rolls, would not seem to be subject to classification as a permanent record. Where the tax assessor, preliminary to the preparation of his final tax assessment roll, prepares temporary tax rolls, subject to change and corrections, as a base for the preparation of the final or permanent tax roll, these temporary tax rolls appear to be in the nature of work sheets rather than permanent records. They do not possess the finality required of permanent or public records. Temporary records, maps, plats, cards and memoranda, or writings, from which the permanent or final tax assessment roll is prepared, are in the nature of work sheets and are not to be classified as public records; however, the records, maps, plats, cards and writings of a permanent nature, used from year to year in the preparation of successive tax assessment rolls, appear to be possible public records. In this latter group would seem to fall those maps required by §193.17, F. S., to be furnished by the

boards of county commissioners to the county tax assessors. General correspondence between the tax assessor and taxpayers and others would not usually constitute a public record within the purview of §119.01, F. S.

The above and foregoing answers the above stated question as well as a general answer may be framed. Specifically, the question of whether or not a *particular* record, map, plat, card, or other memorandum or writing is, or is not, a *public record*, within the purview of §119.01, F. S., must be determined by the application of the above rules to the same.

061-103—June 29, 1961

TAXATION

AD VALOREM TAXATION ON STOCK IN TRADE—APPLICATION OF CH. 61-295, LAWS OF FLORIDA, AMENDING §192.05, F. S. TO 1961 ASSESSMENT—CH. 57-399, LAWS OF FLORIDA, §§200.06, 193.21, 193.25, F. S.; §28, ART. III, STATE CONST.

To: Ray E. Green, State Comptroller, Tallahassee
QUESTION:

Does §1 of Ch. 61-295 have any application to the 1961 assessment of the stock in trade therein defined?

The legislature, by its adjournment on June 2, 1961, brought senate bill 698, now appearing as Ch. 61-295 within the purview of last sentence of §28, Art. III, State Const., providing that "if the legislature by its final adjournment prevents such action (action within five days) such bill shall be a law, unless the governor within 20 days after the adjournment, shall file such bill with his objections thereto, in the office of the secretary of state, who shall lay the same before the legislature at its next session . . ." The 20 days having expired, without the governor taking any action on the bill, it has become a law, and, by the provisions of section three thereof, became "effective immediately upon becoming a law."

Section 1 of said Ch. 61-295 amended §192.05, F. S., regulating the ad valorem assessment of stock in trade, by changing the formula for determining and fixing the full cash value (§200.06, F. S.), of that class of tangible personal property known as stock in trade for purposes of ad valorem taxation. Said §192.05, prior to the said 1961 amendment, required that the value of stock in trade be determined from "the average value of such stock of goods, wares and merchandise, or stock in trade, as held or owned over a period of 12 months next preceding" the tax year for which the assessment is to be made. Section 192.05, as amended in 1961, adopts the valuation of stock in trade as reflected by "the inventory data reported on the taxpayer's federal income tax return and such other sworn data as shall be necessary" for a proper determination thereof by the tax assessor, the taxable value to be 25% of the average valuations based on said inventory data. Said section as amended also provides a penalty for failure to make a tax return showing such inventory data.

The said act having become a law upon the expiration of said 20 day period on June 22, 1961, its effect upon the ad valorem tax assessments of stock in trade, under §192.05, for the tax year of 1961, depends on whether the statute should be deemed retrospective in operation as to the ad valorem taxes. In this state ad valorem taxes are imposed as of January 1 of the tax year and are a lien to

secure the payment of the tax from that date.

In *Gelb v. Aronovitz*, Fla. App., 98 So. 2d 375, text 379, the court remarked that "taxes are usually levied after the thirty-first of August, but relate back as a lien to the first day of January of the same year." In *State v. Green*, Fla., 101 So. 2d 805, the court considered the application of Ch. 57-399, which increased the millage to be imposed on classes "A" and "B" intangible personal property, to the 1957 assessments on such property, said act by its terms having become effective on July 1, 1957, and held that, there being nothing therein showing an intent to make the same retroactive, the same was not applicable to the assessments made for 1957. Here we had merely an increase of the millages to be imposed, there being no change in the manner or formula for fixing values for tax purposes. Section 192.05, as amended by said Ch. 61-295, changes the formula for determining the value of stock in trade for purposes of ad valorem taxation. Under the Florida Statutes, tax returns are required to be filed "on or before April first of each and every year" (§193.21); assessors are required to complete their assessment rolls (as to valuations) "on or before the first Monday in July in each year," which includes a listing of the property descriptions, the name of the owner, and the valuations for purposes of taxation (§193.25). Equalization hearings, under the statute, begin on the first Monday in July of the tax year (§193.25). Doubtless most of these valuations had been fixed and entered on the proposed tax roll before the said Chapter 61-295 became a law and took effect. One of the elements for fixing the value of stock in trade, under the statute as amended in 1961, is the use of copies of federal income tax returns. The statute makes no provision for extending the time for completing and equalizing the tax roll, which would seem to be required if 1961 valuations are to be changed to conform to said Ch. 61-295. *The usual rule is that a statute should not be construed to be retrospective in the absence of evidence of a legislative intent to do so* (84 C. J. S. 159, §58). We find no evidence of such a legislative intent. This indicates a negative answer to the above question.

061-104—June 30, 1961

TAXATION

TAX EXEMPTIONS—RELIGIOUS PURPOSES—RENTAL OF PORTION OF PROPERTY—§1, ART. IX, §16, ART. XVI, STATE CONST.; §192.06, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. Where an incorporated church owns real property upon which is located its church house, Sunday school buildings, parking areas, kindergarten playgrounds, and three buildings rented by it, what portion of such property is entitled to tax exemption?

2. Where an unincorporated church owns a parcel of land, separate and apart from its main church property, used by it as a recreation area, is such property entitled to tax exemption?

3. Where the board of pensions and homes, of an organized church, maintains an apartment building designed for use as homes for its retired ministers and

religious workers, is such property entitled to tax exemption?

4. What is the effect of the rental of one or more of such apartments during a vacancy between occupancies by retired ministers or religious workers?

The first question involves a large urban church, organized as a nonprofit corporation under the statutes and laws of Florida, said church owning better than 90% of a city block, its church and Sunday school buildings occupying more than 55% of the said area owned by it. There seems to arise no question as to the right of the area upon which the church and Sunday school buildings are located to tax exemption under the statutes and laws of Florida. The remaining approximate 45% of the area owned by the said church is used, a large part for parking by those attending church and Sunday school services and other functions of the church on Sundays, another part as office rentals to the public, another as rental property to the county for the maintenance of a public library, another part as rental property for the operation of a restaurant, as income producing property. The church also maintains a kindergarten playground on the property. The parking areas are leased during the week days, as we understand to the city for the parking of police and other city owned motor vehicles. We are further advised that the proceeds from such rentals become a part of the general operating fund of the church from which payments in amounts coming due in connection with the purchase of a portion of the lands now owned by the church are made. These payments probably exceed the income from such rentals. The property so purchased is held for present and future use for religious and associate purposes.

The second question involves a parcel of land, separate and apart from the church house and Sunday school buildings, upon which the church maintains a planned recreational program, including church picnics, homecoming dinners, family recreation by members of the church and their families, etc.

The third question involves an apartment building, owned and operated by the board of pensions and homes of one of the church conferences, consisting of a number of residence apartments designed and held as residences for retired ministers and religious workers of the said church conference. It is presumed that the retirement plan of the church is to settle a retired minister or religious worker in each of the apartments during his period of retirement as a part of his retirement benefits. From time to time vacancies may arise when there is no qualified retiree immediately available for the occupancy of the vacant apartment, during which time the vacant apartment will be rented to nonretirees and the rents received will be paid into the retirement and pension fund from which retired ministers and religious workers are paid their retirement benefits.

The fourth question poses the effect of rental of church and other religious property during periods when not required for such church or religious purposes.

Exemptions from ad valorem taxation in this state, except as otherwise governed by specific provisions of the Florida constitution, are governed by §1, Art. IX, and §16, Art. XVI, State Const., and statutes supplemental thereto. The supreme court, in *L. Maxcy, Inc. v. Federal Land Bank*, 111 Fla. 116, 150 So. 248, text 250; *State v. St. John*, 143 Fla. 544, 197 So. 131, text 134;

and *State v. Doss*, 146 Fla. 752, 2 So. 2d 303, text 304, held the provisions in said §1, Art. IX, to be limitations "upon the power of the legislature to provide for the exemption from taxation of any class of property except those particularly mentioned classes in the organic law itself." Section 1, Art. IX, has never been deemed self-executing, and to be effective legislation is necessary to make effective the tax exemption. Section 16, Art. XVI, was self-executing, no legislation being required to make it effective, in *Lummus v. Miami Beach Congregational Church*, 142 Fla. 657, 195 So. 607, text 608; *Fleisher Studios, Inc. v. Paxon*, 147 Fla. 100, 2 So. 2d 293, text 294. Section 16, Art. XVI, mandatorily requires the taxation of the property of corporations, both real and personal, in this state "unless such property be held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes." Section 1, Art. IX, does not itself grant any tax exemptions, but authorizes the legislature to provide tax exemption for property held and used exclusively for "municipal, education, literary, scientific, religious or charitable purposes." Section 192.06, F. S., is the legislation provided under and pursuant to §1, Art. IX, State Const. It is evident from *Lummus v. Miami Beach Congregational Church*, supra, that the exemption granted religious corporations under §16, Art. XVI, State Const., is broader in its scope than that granted to nonincorporated religious associations and organizations under §1, Art. IX, as implemented by §192.06(4), F.S.

As we are here dealing primarily with churches and their purposes and functions, we are primarily concerned with "*religious purposes*," as used in both of the above mentioned constitutional provisions, and secondarily, concerned with other of the purposes mentioned, especially charitable and educational. "'Religious purpose,' as applied to the uses of property within the requirements of tax exemption laws, has been defined as a use of property by a religious society or body or persons as a stated place of public worship, Sunday schools, and religious instruction, and the word 'purpose' has been defined as the object or end to be attained." The words "religious purposes" are so analogous to "religious worship" that the use of the term "religious purposes" instead of "religious worship" was held an immaterial variance in an indictment (*Laird v. State*, 69 Tex. Cr. R., 553, 155 S. W. 260, text 262). Property devised to a Methodist conference as a superannuates' home, or other similar purposes, and occupied by a retired Methodist preacher, was deemed to be used for "religious purposes" in *Trustees New Hampshire Conference v. Sandown*, 87 N. H. 47, 173 A. 805, text 806. The use of property for masses, burial grounds, missionary societies, temperance unions, camp meeting associations, church publications, and similar uses and purposes, has been held to be uses for a "religious purpose." (36 Words and Phrases, under title of "Religious Purpose"). See also Annotations in 34 A. L. R. 653, 62 A. L. R. 333, and 108 A. L. R. 291.

In *Lummus v. Miami Beach Congregational Church*, supra, the church used a vacant lot as a parking area for those who attended church services and other church meetings, upon which lot tax exemption was claimed. It was held that the church property described, although not occupied by a church building, was "used and held exclusively for the purpose given in the constitution albeit it is not continuously so employed," within the purview of §16, Art. XVI, State Const. In this case the court, discussing the appli-

cation of §1, Art. IX, State Const., as implemented by §192.06(4), F. S., remarked that "it is apparent under the first quoted part of the constitution (§1, Art. IX) and the definitive statutes (§192.06(4), F. S.), exemption of property for religious purposes would not obtain except as to the church building and lot occupied by it," but not to the parking area. This expression of the court seems to point out the distinctions, as to church property, between §1, Art. IX, as implemented by §192.06, F. S., and §16, Art. XVI, State Const.

Section 192.06(3), F. S., provides tax exemption for property held and used for educational, literary, benevolent, fraternal, charitable and scientific purposes, under §1, Art. IX, State Const. It is of significance that the legislature, when it formed and adopted §192.06(3), F. S., omitted therefrom the phrase "religious purposes." Said subsection (3) relates to educational, literary, benevolent, fraternal and charitable purposes," of eleemosynary corporations, associations and other bodies. Said subsection (3) by proviso provides that where "not more than *seventy-five per cent* of the floor space of said building or property is rented and the rents, issues and profits of said property are used for educational, literary, benevolent, fraternal or charitable purposes of said institutions," its right to tax exemption will not be defeated. No like or similar proviso is found in said §192.06(4), relating to houses of public worship. We next raise the question of whether or not there is, or may be, an overlapping between religious and charitable purposes, so that properties held by a church but used for charitable or similar purposes, not strictly religious by nature, may be entitled to tax exemption as property held and used for charitable purposes.

It was stated in *Montgomery v. Carlton*, 99 Fla. 152, 126 So. 135, text 140, that "a gift to a church is a charitable one, and it is well settled that a Christian church, lawfully existing, is a charity within the meaning of the Statute of Elizabeth" (13 Eliz., Ch. 5, 1571). In *Porter v. Baynard*, 158 Fla. 294, 28 So. 2d 890, text 894, 170 A. L. R. 747, it was stated that "a charity, in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds and hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, . . ." To the same effect see also *Jordan v. Landis*, 128 Fla. 604, 175 So. 241, text 246. "Gifts, devises and bequests intended to foster religious instructions and to aid in the publication of religious doctrines, including gifts for the support of ecclesiastical denominations and organizations and promotions of various religious opinions," have been held to be charities (5 Fla. Jur. 573, §9). In *Re Williams*, Fla., 59 So. 2d 13, the court held a gift of money to be used in broadcasting the gospel over radio by a religious society to be a charitable one. The term "charitable purposes" may "be applied to almost anything tending to promote the well doing and well being of social man, but the use or purpose must be a public, as distinguished from a private, one, for the benefit of the public at large or a portion thereof, or for the benefit of an indefinite number of persons" (14 C. J. S. 439, §12). "No fixed rule has been established by which it can be determined whether an organization is charitable, within a tax exemption statute, and each case must turn on its particular facts."

(Emphasis supplied.) (84 C. J. S. 543, §282).

Modern day churches, especially the larger of the group, engage generally in religious, benevolent and charitable activities, and for many such purposes may be deemed "charitable institutions," as well as religious institutions. (*Gieger v. Simpson Methodist-Episcopal Church*, 174 Minn. 389, 219 N. W. 463, text 464, 62 A. L. R. 716). Trusts set up for the purpose of advancing religious teaching may be classified as charitable trusts (*Bridgeport City Trust Co. v. Bridgeport Hosp.*, 120 Conn. 27, 179 A. 92, text 94; *Vance's Estate*, Cal. App., 4 P. 2d 977, text 978; *Edge's Estate*, 288 N. Y. S. 437; *Delaware Trust Co. v. Fitzmaurice*, 27 Del. Ch. 101, 31 A. 2d 383, text 388; *Girard Trust Co. v. Commissioner*, CCA 3rd., 122 Fed. 2d 108, text 109; *Henshaw v. Flenniken*, 183 Tenn. 232, 191 S. W. 2d 541, text 544; *Powers v. First Nat'l Bank*, 138 Tex. 604, 161 S. W. 2d 273, text 279; *Bianchi v. South Park Presby. Church*, 123 N. J. L. 325, 8 A. 2d 567, text 569). The word "charitable" when used in connection with gifts for charitable purposes includes religious purposes (*Julian's Estate*, 93 Ohio App. 221, 113 N. E. 2d 129, text 134; *Powers v. First Nat'l Bank*, supra; *Scobey v. Beckman*, 111 Ind. App. 574, 41 N. E. 2d 847, text 849). Gifts for the support of superannuated preachers have been held for charitable purposes (14 C. J. S. 491, §42, note 16). Gifts for the support of the ministry have been held to be charitable ones (10 Am. Jur. 625, §56, note 14). Devises to religious groups to be used for the support of old and needy ministers of a denomination have been held to be a charitable purpose (14 C. J. S. 451, §18, note 76), as have also gifts for superannuated ministers (14 C. J. S. 491, §42, note 16). A teachers' retirement fund was held a charity in *Powers v. Home for Aged Women*, R. I., 192 A. 770. The following have been charities: gift for the support of a minister (*Farmers and Merchants Bank v. Robinson*, 96 Mo. App., 385, 70 S. W. 372); gift for the support of farmers entitled to charity (*Continental Ill. Nat'l Bank v. Harris*, 359 Ill. 86, 194 N. E. 250); gift for the benefit of ministers generally (*Re. Edge's Estate*, 288 N. Y. S. 437), and a home for working girls (*Franklin Square House v. Boston*, 188 Mass. 409, 74 N. E. 675) and other similar cases.

From the above and foregoing it is apparent that by reason of their combined religious, benevolent and charitable activities, many of our present day churches and religious organizations qualify not only as religious institutions but as charitable institutions as well. Where a church carries on religious, benevolent and charitable functions, it would seem to qualify both as a religious and as a charitable institution, and, because of their church schools and other educational functions, may also qualify as an educational institution, in some instances. Whether a religious institution also qualifies as a charitable or as an educational institution, or both, is largely a question of fact to be determined from the facts and circumstances involved in each particular case. Where a religious institution qualifies, under the law also as a charitable or educational institution, then the laws applicable to each should be applied, including, §192.06(3), under which "not more than seventy-five per cent of the floor space of said building or property is rented and the rents, issues and profits of said property are used for the "educational, literary, benevolent, fraternal or charitable purposes of said institution." Where not more than "seventy-five per cent of the floor space of said building or property

is rented," as authorized by said §192.06(3), the question arises, as one of fact, whether "the rents, issues and profits" so received from such rentals were or are being used "for educational, literary, benevolent, fraternal or charitable purposes of" the institution.

As to the rental contemplated in question 1, the space leased is less than the 75% mentioned in said §192.06(3); and as to the rental contemplated in the fourth question, we have evidence that it usually will not exceed 50% of the floor space in the building. Before there may be tax exemption under said subsection (3), it must be demonstrated as a matter of fact that the rents, issues and profits received are used for "the educational, literary, benevolent, fraternal, or charitable purposes of said institutions." Under question 1, such rents, issues and profits received are paid into the general operating fund of the church and used for general operating purposes, including the making of installment payments on mortgaged property of the church. Under questions 3 and 4, the rents, issues and profits are paid into the board of pensions and homes fund of the conference to be used for housing and retirement benefits for retired ministers and religious workers. This seems to pose the question of whether the payment of retirement benefits to ministers of the conference is to be considered a payment for benevolent and charitable purposes.

AS TO QUESTION 1:

The portion of the property described in question 1 being used for church and Sunday school purposes, without any rental of the same, is clearly entitled to tax exemption. The remaining portion of the property, some used only during weekdays, the same being used on Sundays as parking areas for members and others attending church and Sunday school; other for constant rental occupancy by lessees without any church or Sunday school use. We are advised that the rentals received by the church, as aforesaid, are paid into and become a part of the general operating fund of the church, such rentals not being earmarked and segregated for the making of mortgage and interest payments. In *Simpson v. Bohon*, 159 Fla. 280, 31 So. 2d 406, a portion of the Elks club building (43.1% of the floor space) was rented to third parties, such rentals totaling more than \$85,000 for the year in question. Of this amount \$25,000 went for the operation, maintenance and repair of the building, over \$43,000 toward paying off a mortgage encumbering the property, \$11,000 for the payment of taxes, and \$16,650 for the purchase of bonds. None of these payments appears to have gone for charity; the court having remarked that "the stern fact is that not one dollar of this huge sum found its way into the charity fund. There is a vast and obvious difference in collecting money and paying it out in charities and that of creating a capital estate." With the above mentioned Elks club, the use of income for paying off an encumbering mortgage was not a use for charitable purposes. In the Elks club case some \$43,000 of a total rental income of about \$85,000 was used for paying off a mortgage. It appears to have been the court's view that such use was not one for "religious, scientific, municipal, educational, literary or charitable purposes."

In *St. Augustine v. Middleton*, 147 Fla. 529, 3 So. 2d 153, text 156, the court remarked that "to entitle the whole or a severable portion of the property of a private corporation to exemption from taxation, the entire property, or the severable portion thereof that is sought to be exempted from taxation, must be clearly shown

to be held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes." See also *State v. St. Johns*, 197 Fla. 131, 197 So. 549, relative to the use of property of the housing authority of Jacksonville. If the tax assessor finds that the parking areas in question, or any of them, are used for religious purposes on Sundays and by the city for municipal purposes, such as a parking area for municipally owned vehicles used for municipal purposes, on week days, then such use would seem to be within the above quoted language from *St. Augustine v. Middleton*. If any portion of the property is used by the county to house its county library, such use would also seem to be within the purview of §1, Art. IX, and §16, Art. XVI, State Const.

Whether or not the rents, issues and profits from the rental of the properties of the church are used for educational, literary, benevolent, fraternal or charitable purposes of the institution, so as to be within the purview of §192.06(3), F. S., is a question of fact, to be determined from the applicable facts, by the taxing officials.

AS TO QUESTION 2:

The parcel of land mentioned in question 2 is not entitled to tax exemption under §192.06(4), F. S., not being used for any of the purposes therein mentioned. However, this fact will not prevent it qualifying for tax exemption under said §192.06(3), should its use be deemed "educational, literary, benevolent, fraternal or charitable," so as to be within the purview of said subsection.

AS TO QUESTION 3:

Where the board of pensions and homes of an organized church maintains an apartment building designed for use as homes for its retired ministers and religious workers, such property may be entitled to tax exemption where such ministers and religious workers continue to be ministers and workers for such church organization, although with reduced duties and obligations to such church. It is our general understanding that most, if not substantially all, retired ministers continue as ministers of the church, performing such religious services as their health and strength will permit. Under these circumstances, such apartments have many of the features of parsonages. Where such ministers and religious workers are disabled and unable to perform any work, their pensions and living quarters would seem to take on many of the features of a charity.

AS TO QUESTION 4:

Under the facts and circumstances contemplated and presumed under our discussion of question 3, the apartment buildings may well be within the purview of §192.06(3), F. S.

061-105—June 30, 1961

TAXATION

**LICENSE TAXES—EFFECT OF 1961 AMENDMENT TO
§205.59, F. S. (CH. 61-295, LAWS OF FLORIDA) UPON
ISSUANCE OF LICENSES UNDER §§205.03, 205.04,
F. S., §28, ART. III, STATE CONST.**

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Does §2, Ch. 61-295, have any application to occupational licenses within its purview obtained after the effective date of said chapter?

The legislature, by its adjournment on June 2, 1961, brought senate bill 698, now appearing as Ch. 61-295, within the purview of last sentence of §28, Art. III, State Const., providing that "if the legislature by its final adjournment prevents such action (action within five days) such bill shall be a law, unless the governor within 20 days after the adjournment, shall file such bill with his objections thereto, in the office of the secretary of state, who shall lay the same before the legislature at its next session . . ." The 20 days having expired, without the governor taking any action on the bill, it has become a law, and, by the provisions of section three thereof, became "effective immediately upon becoming a law."

Section 2, Ch. 61-295 amends §205.59, F. S., by deleting therefrom the provisions that "wholesalers and others who keep a stock of merchandise for sale shall pay an additional tax of eighty cents for each thousand dollars of the inventory of their stock of merchandise . . ." and eliminating the said inventory tax. The license tax year begins on Oct. 1, as to said §205.59, so that the license tax year in force when said Ch. 61-295 was enacted, became a law and took effect, was the license year beginning Oct. 1 of 1960 and which will end on the last day of September, 1961.

License taxes under §205.59, are imposed for terms beginning on Oct. 1 of one year and ending the last day of September of the following year (§§205.03 and 205.04, F. S.). *The license tax for businesses established during the last half of the license year is one-half of the annual tax imposed (§205.04)* "It is generally held that statutes in force at the time the tax is levied continue in force for its collection, notwithstanding the amendment or repeal of the taxing statute" (*Lee v. Walgreen Drug Stores Co.*, 151 Fla. 648, 10 So. 2d 314, text 316). We are, therefore, of the opinion that licensees, who obtained licenses under §205.59, prior to the said amendment, will not be entitled to refunds of taxes paid prior to the said amendment. This seems to leave for further consideration the question of the license tax to be charged licensees obtaining licenses for the operation of businesses established after the effective date of the 1961 amendment, and prior to Oct. 1, 1961.

Businesses established after the beginning of the license tax year, unlike taxable property brought into the state after the tax day, are subject to a license tax (§205.04, F. S.). This being true, businesses established after the effective date of Ch. 61-295, which are within the purview of §205.59, are subject to a license tax. The application of the amendment goes to the question of whether the 80¢ per thousand dollars of inventory value of the licensee's stock in trade is applicable to such businesses as are established after the effective date of said Ch. 61-295, and before Oct. 1, 1961, the beginning of the next license tax year. "The amount of a license fee or tax ordinarily may be increased or decreased at any time in the discretion of the body imposing it. Where the state or city has full power to tax an occupation, it may increase the rate on a particular class of persons engaged therein at any time before the expiration of the period for the enforcement of the tax, even though such increase is made after the tax first levied has been paid. It has been held that the amount of the license fee may be increased pending an application for a license, and the applicant be compelled to pay the increased fee." (53 C. J. S. 514, §18). "The constitutional inhibition as to the impairment of the obligation of a contract does not extend to licenses. A license is not a contract between the sovereignty and the licensee, and is not

property in a constitutional sense. It does not confer a vested, permanent or absolute right, but only a personal privilege to be exercised under existing restrictions such as may hereafter be reasonably imposed. Free latitude is reserved by the governmental authority to impose new and additional burdens on the licensee, or to revoke the license." (33 Am. Jur. 342, §21; see also 21 Fla. Jur. 36 and 37, §33).

We are, therefore, of the opinion that where a business, within the purview of §205.59, is established, after the effective date of Ch. 61-295, that the license tax to be collected is governed by said section as amended, and not by the section as it existed prior to amendment. The uniformity and equality of taxation, required by §1, Art. IX, State Const., are not applicable to license and excise taxes (*Amos v. Matthews*, 99 Fla. 1, 126 So. 308, text 326; *Louis K. Liggett Co. v. Amos*, 104 Fla. 609, 141 So. 153, text 157. Section 205.04, which provides for a half-year license for those businesses established during the last half of a license year in effect makes a classification of such businesses and provides a half-year license therefor. Under the above cited authorities, the legislature had the power and authority to change the fees for the same, as it did by the amendment of §205.59, by Ch. 61-295. Therefore, for new businesses established after Ch. 61-295 became a law and took effect, the license tax of 80c per thousand dollars of inventory value is no longer effective. This, however, does not affect the \$10 license taxes mentioned in the statute.

The above question is, therefore, answered in the affirmative.

061-106—July 6, 1961

TAXATION

LIENS OF ASSESSMENTS AND TAXES—APPLICATIONS
FOR TAX DEED SALES—MUNICIPAL—§§194.15-194.25,
194.43, 194.44, 194.47-194.57, 193.63, 167.41, 167.43, 167.44,
167.46, 167.47, 192.21, 193.61, 193.62, 170.09, 170.10,
F. S.; §5, ART. IX, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTIONS:

1. Are the special assessments authorized by Ch. 170, F. S., equal in priority to municipal and county ad valorem taxes?

2. Should an applicant for a tax deed sale pursuant to §§194.15-194.25, F. S., be required to purchase or redeem municipal and district tax and assessment liens of equal dignity to the liens of the county taxes encumbering the same lands?

3. Should such applicant be required to purchase or redeem municipal and district tax or assessment liens encumbering the same lands but inferior in dignity to the county tax sale certificate liens?

4. May holders of municipal and district tax liens, whether of equal dignity to the county tax sale certificate or not, make application for tax deed sales under and pursuant to said §§194.15-194.25, F. S.?

Question 1 was considered in our opinion 061-58, of April 6, 1961, addressed to Ward and Ward, as attorneys for the clerk of the circuit court in and for Dade county, which opinion is hereby made a part hereof by reference and confirmed as an official opinion to you.

Sections 194.15 - 194.25, F. S., provides a statutory method for enforcing *the lien of county taxes*, as declared and fixed by §192.21, F. S., when owned and held by individuals, firms and corporations. Sections 194.47 - 194.57, F. S., make provision for the enforcement of liens of tax sale certificates owned and held by the counties. The "holder of a tax certificate, other than the county," may proceed under said §§194.15 - 194.25, to enforce the lien of his county tax sale certificates. Sections 194.47 - 194.57 provide the procedure to be followed by the counties in enforcing their tax sale certificate liens. We are here primarily concerned with the enforcement of tax sale certificate liens held by individual owners, not those held by the counties. Although applicants under §§194.15 - 194.25 are required to "pay to the clerk the proper amount fixed by law for the redemption or purchase of *all other outstanding certificates covering said lands . . .*" (emphasis supplied) we find no express mention of municipal and district tax and assessment liens encumbering the same land. This brings us to the construction of the above phrase "all other outstanding certificates covering said lands," to determine whether municipal and district tax and assessment liens are included therein.

Under §194.22, F. S., upon the completion of the tax deed sale and the making, execution and delivery of the tax deed, the clerk is required to pay, from the purchase money paid for the lands sold, the amount due the applicant, and from the excess, if any, the tax lien obligations of municipal and district taxes and assessments encumbering the lands sold, and, if there remain a balance after the payment of such liens, it is payable to the former owner of the lands. If the balance remaining after the payment of the claim of the applicant is insufficient to pay municipal and tax liens in full, the balance is apportioned between such liens and the unpaid balance *continues to encumber* the said property. This differs from county tax lien foreclosures under §§194.47 - 194.57, F. S., where all such liens are cancelled, whether the funds received at the sale of the lands are sufficient to pay them in full or not. Although many municipalities issue tax sale certificates, as do the counties, upon the delinquent tax sale, others do not hold delinquent tax sale or issue tax sale certificates.

An examination of said §§194.15 - 194.25, F. S., and Ch. 17457 and 20722, 1935 and 1941, from which said sections were derived, as well as former §§776 - 780, R. G. S., 1920, and the session laws from which derived, we find nothing indicating a legislative intent or purpose to require the inclusion of delinquent municipal and improvement district taxes and assessments, in connection with applications for tax deeds or tax deed sales consequent upon state or county tax sale certificates. No tax deed sales appear to have been held prior to the enactment of Ch. 17457, 1935. Prior to that time upon the making of the application for tax deed, notice to redeem was issued, served and published to those interested, and upon failure to redeem a conveyance was made to the holder of the tax sale certificate, or his assignee. (See §§776, et seq., R. G. S., 1920). Furthermore, provision appears to have been made, at least since 1887, for the issuance of tax deeds by the clerk of the circuit court for municipal tax sale certificate liens, such deeds being made *in the name of the municipal corporation* (§§194.43 and 194.44, F. S.; Chs. 3681 and 4322, 1887 and 1895). These sections seem to contemplate proceedings separate and apart from that provided by §§194.15 - 194.25, F. S.

Many municipalities and improvement districts do not hold

delinquent tax sales and issue tax sale certificates, as do counties. Many such municipalities and improvement districts foreclose their liens in equity; many charter provisions contain no provision for the sale of tax delinquent lands and the issuance of tax sale certificates. Some municipalities and improvement districts do, however, sell delinquent tax liens and issue sale certificates. Under §193.63, F. S., where their charters do not provide otherwise, municipalities conform to Chs. 192 - 194, F. S., with reference to the care, custody, sale and redemption of tax sale certificates, and, where tax sale certificates are issued by a municipality, the clerk of the circuit court may issue tax deeds in the name of the municipality.

At common law, where not otherwise provided by statute, taxes were collected through a common law proceeding known as an information for debt (51 Am. Jur. 863, §895). Tax liens in this state are governed by statute, there being no constitutional provision concerning them. "A tax is not a lien even upon the property against which the tax is assessed unless made so by statute . . . , it being solely a creature of statute" (St. Petersburg v. Fiore, 160 Fla. 106, 33 So. 2d 852, text 853 and 854). Where municipal or improvement district tax and assessment liens are of equal dignity with county tax liens, the obtaining of a tax deed to the property pursuant to the county tax lien will not cancel the municipal or improvement district tax lien (Baldwin Drainage Dist. v. MacClenny Turpentine Co., 154 Fla. 525, 18 So. 2d 792, text 793 and 794; Bice v. Haines City, 142 Fla. 371, 195 So. 919, text 925; Carlile v. Melbourne-Tillman Drainage Dist., 143 Fla. 355, 196 So. 687). The rights of a holder of a municipal or improvement district in a tax lien equal in dignity to that of county tax lien are vested rights which may not be taken from him by subsequent legislation. Although the holder of the county tax lien obtains a tax deed upon his lien, which is equal in dignity with the municipal or district tax lien, such tax deed proceeding and tax deed will not divest the lien of the holder of the municipal or district tax lien. After tax deed, liens of equal dignity to the lien upon which the tax deed was issued, will continue to encumber the property. These cases indicate that liens inferior to the county tax liens are destroyed and no longer exist upon the issuance of the tax deed.

Further, upon the question of the enforcement of municipal taxes and tax liens, we are of the opinion that *where no other provision is made in a legislative charter* that under §5, Art. IX, State Const., and §§167.41, 167.43, 167.44, 167.46, 167.47, 192.21, 193.61, 193.62, 194.43 and 194.44, the procedure for the assessment of the tax and its collection, including the delinquent tax sale and issuance of the tax sale certificates, and enforcement, including application for and issuance of tax deed, would be substantially the same as county tax assessments, sales and enforcement. However, this would be a municipal and not a county procedure. When the clerk of the circuit court proceeds to issue tax deeds pursuant to §§194.43 and 194.44, F. S., he acts as agent for the municipality and not as agent for the state or county. Even if §§194.15 - 194.25, F. S., be applicable to the enforcement of municipal taxes, the proceeding is a municipal and not a state or county one. The enforcement of municipal and county tax sale certificates should not be consolidated and combined into a single proceeding, at least until approved by the legislature or by the courts.

Specific mention is made in the file of §170.09, F. S., as amended by §6, Ch. 59-396, and the improvement liens therein

described. Prior to this amendment it appears that such liens were inferior to the liens of county ad valorem taxes imposed by statute upon the same lands; however, after the said amendment, which appears to have become effective on June 17, 1959, such liens are "co-equal with the liens of other taxes," including county ad valorem taxes. Section 170.10 provides that "upon the failure of any property owner to pay any annual installment due, or any part thereof, or any annual interest upon deferred payments, the governing authority of the municipality shall cause to be brought the necessary legal proceedings by bill in chancery to enforce payment thereof" We find nothing in Ch. 170, F. S., providing for the sale of such improvement liens and the issuance of certificates evidencing such liens and the sale thereof. This type of lien does not appear to be within the purview of §§194.15 - 194.21; however, in case of a tax deed sale for a consideration in excess of the tax liens involved in the application for a county tax deed sale, including costs and expenses, it would appear to be within the purview of §194.22, relative to the disposition of such excess.

Question 1 was answered in our opinion of April 6, 1961 (AGO 061-58) which opinion and answer are hereby confirmed and adopted as one directed to you.

Questions 2, 3 and 4 are each answered in the negative, in the absence of a special, or local, act, or other act of limited application, providing otherwise.

061-107—July 6, 1961

TAXATION

HOMESTEAD TAX EXEMPTION—REQUIREMENTS—§7, ART. X, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are owners of residence units, each being physically separate from the other such units, although such space of separation is limited, residing on and making the said units their permanent homes, entitled to homestead tax exemption?

The residence units in question are so constructed as to be separate and distinct units, with a space of at least 12 inches between outside walls and at least eight inches between the roofs, and for the purposes of this opinion, are presumed to have separate roofs covering the same, each such roof having no physical connection with the roof of any other such residence unit. Each such residence unit will be sold and conveyed to its owner and occupant by its own self contained legal description, no part thereof being separated from the other parts thereof. It is further presumed that there will be no common roof covering any two or more of them, nor will the walls or roof of any such unit have any physical connection with any wall or roof of another. Although the parcels of land upon which such residence units may be located may be small, and its physical separation from other such units also small, we presume that its physical separation from every such unit will be complete. We further presume that the legal title, or beneficial title in equity, to each said residence unit, including the lands upon which located, will be vested in the owner and occupant thereof.

Although the building lots in the average subdivision are more spacious, so that the buildings thereon are separated by more space,

there is little, if any, legal difference between housing units in such a subdivision and the housing units above described. The fact that these residence units, including their roofs, are separate and apart from each other, distinguishes them from the residence units involved in *Overstreet v. Tubin*, Fla., 53 So. 2d 913, and *Gautier v. State*, Fla. App., 127 So. 2d 683, where the residence units had a common roof, making them a single dwelling house within the purview of §7, Art. X, State Const.

Where dwellings are located upon building lots of sufficient size, the outbuildings are usually located upon the same building lot within what is usually referred to as the curtilage thereof; this often includes driveways, laundry buildings, garages, recreation areas, and the like. Such a curtilage area of a building lot is usually included within the homestead area, especially where the entire building lot does not include more than one-half acre within incorporated municipalities. We gather from the file that the owners of such residence units own or have the use of driveways, shuffleboard courts, lounge and laundry rooms, etc., not located upon the area upon which the residence units are located. Such driveways, shuffleboard courts, lounge and laundry rooms, etc., being located upon areas not within the area occupied by the dwelling unit of the owner and occupant, are not a part of the homestead and are not entitled to homestead tax exemption.

The above question, under the facts and circumstances herein presumed, is answered in the affirmative. The primary question here involved is whether or not the dwelling units are so located and constructed as to constitute a single dwelling house, or separate dwelling houses, within the purview of §7, Art. X, State Const.

061-108—July 7, 1961

LICENSE TAXES

PERMITS REQUIRED OF TRAVELING SHOWS—CONSTRUCTION OF CH. 61-273, LAWS OF FLORIDA (§205.322, F. S.)
—CH. 59-167, LAWS OF FLORIDA (§616.18, F. S.)

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Does Ch. 61-273 require a separate permit and the payment of a separate permit fee for each location of the businesses therein described and defined?

Although Ch. 61-273 is in the form of an original act, making no reference to former §205.31, Ch. 59-167, or §616.18, of the statutes and laws of this state, a comparison of said Ch. 61-273 with said former §205.31, and with said Ch. 59-167, and §616.18, reveals that said Ch. 61-273 is in fact and substance an amendment of said statutes and laws. Chapter 59-167 amended, transferred and renumbered said §205.31 as §616.18, F. S. Doubtless the legislature intended said Ch. 61-273 as an amendment of §616.18, which had been renumbered and transferred in 1959 from and as §205.31. An examination of the first paragraphs of §205.31 with §616.18 reveals an addition in §616.18 not appearing in said §205.31. Where §205.31 prohibited the operation of the subject shows "without having first obtained from the comptroller of the state a permit," evidently requiring but a single permit no matter the number of locations in the county or state; §616.18 (§205.31 as amended and renumbered by Ch. 59-167), prohibited such operations "without having first obtained from the state department of agriculture a

permit to so do for each separate location that the traveling show, exhibition or amusement appears in this state." Chapter 61-273 prohibits such operations "without having first obtained from the comptroller of the state a permit to so do for each location where appearing."

Under §205.31(4), a permit fee was required, which appears to have been a general one for all locations. Under §616.18, subsection (4) required a permit "for each location that the applicant shall appear at . . ." A general reading of Ch. 61-273 reveals an intention to require permits for each location where the shows, exhibitions and enterprises regulated thereby may be operated.

The above stated question is, therefore, answered in the affirmative.

061-109—July 7, 1961

CORPORATIONS

PROFESSIONAL SERVICE CORPORATION ACT—CH. 61-64,
LAWS OF FLORIDA, (CH. 621, F. S.)—
§608.03(1)(a), F. S.

To: Tom Adams, Secretary of State, Tallahassee

QUESTION:

Does Ch. 61-64, authorizing the creation of professional service corporations, permit the formation of such a corporation by a single incorporator or must there be three or more incorporators as is provided for in §608.03(1)(a), F. S.?

In construing acts of the legislature, legislative intent is the pole star by which we must be guided (*Ervin v. Peninsular Tel. Co.*, Fla., 53 So. 2d 647, *Smith v. Ryan*, Fla., 39 So. 2d 281, and *Fla. State Racing Comm. v. McLaughlin*, Fla., 102 So. 2d 574). In this instance the most recent expression of legislative intent appears to be set out in §1, Ch. 61-64, which provides:

It is the legislative intent to provide for the incorporation of an individual or group of individuals to render the same professional service to the public for which such individuals are required by law to be licensed or to obtain other legal authorization. (Emphasis supplied.)

In addition, individuals are again referred to in §§4, 5 and 9, Ch. 61-64. The only reference to the general corporation act requiring three or more incorporators is found in §13 of Ch. 61-64 which reads in part as follows:

Chapter 608, F. S., shall be applicable to a corporation organized pursuant to this act *except to the extent that any of the provisions of this act are interpreted to be in conflict with the provisions of Ch. 608, F. S., . . .*" (Emphasis supplied)

The italicized portion of the above quoted section is to be given special emphasis here as this office is inclined toward the position that there is, insofar as this question is concerned, a conflict between Ch. 61-64 and the general corporation law, Ch. 608, F. S.

Accordingly it is the opinion of this office that it was the intent of the legislature to permit the professional service corporations authorized in Ch. 61-64 to be organized by a single individual incorporator and that the requirement that there be three or more incorporators found in §608.03(1), (a), F. S., is not applicable here.

061-110—July 11, 1961

TAXATION

CONTRACTS FOR DEED AS INTANGIBLE PERSONAL
PROPERTY FOR TAX PURPOSES—CH. 199, §§199.01,
199.05 AND 192.03, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are agreements for the sale and conveyance of real property in this state intangibles subject to taxation under Ch. 199, F.S., and if so, how should their value for tax purposes be determined?

We have examined the copy of an agreement for deed, handed us with your request for opinion, bearing date of Jan. 10, 1960, between Armstrong Manor, Inc., a Florida corporation, as seller, and Benjamin Samuel and wife, as purchasers, under which the seller agrees to sell and convey, and the purchasers to purchase, lot 7, block 15, 1st addition to Richmond Heights estates, in Dade county, for a consideration of \$11,845, "of which \$345 is hereby acknowledged and received as closing costs, and the balance, to wit, \$11,500, consists of a first mortgage encumbering the above described property and seller's equity shall be paid in weekly installments of \$23.50, commencing on Monday, Jan. 18, 1960, and continuing in like amounts on each consecutive Monday thereafter until the entire sums due and owing on said first mortgage and seller's equity shall have been paid in full. Each weekly payment of \$23.50 as paid by the buyers to the seller shall be escrowed by the seller for the payment of principal, interest, taxes, insurance and servicing costs as the same accrue on the above described property and any encumbrances thereon. After the monthly payments for principal and interest on the said first mortgage have been paid and the monthly reserve has been accumulated for taxes, insurance and servicing costs, the balance remaining from escrowing of the aforesaid weekly payments shall be applied by seller to the accrued interest on its equity, and the payment thereof, and the remainder toward the seller's equity." Provision is made for acceleration of payments in case of default and foreclosure of the said agreement for deed. Upon full payments of the obligation set out in the said contract, the seller agrees to convey the property, by good and sufficient warranty deed, to the purchasers.

Although reference is made in the contract for deed to a first mortgage, such mortgage is not further identified, leaving us to conjecture as to whether the said first mortgage encumbered the property at the time of the making of said agreement, or whether it was made concurrent with or after the entering into of the said agreement for deed. We, for the purposes of this opinion, presume that the mortgage in question was made either by the seller or its predecessor in title. We find nothing in the file indicating that the purchasers, or either of them, have assumed and agreed to pay the mortgage indebtedness in connection with the transaction. The personal liability of the purchasers for the payment of the mortgage indebtedness does not appear from the file before us, neither are we advised as to the unpaid balance due on the mortgage if the same exists. We are here considering the agreement for deed before us as an intangible under Ch. 199, F. S. Section 199.01, F. S., defines *intangible personal property*, for the purposes of ad valorem taxation, as "all personal property which is not of itself intrinsically valuable but which derives its chief value from that

which it represents." In *Re Plasterer's Estate*, 49 Wash. 2d 339, 301 P. 2d 539, text 540, the court said that "the right to receive payments due under a contract for the sale of land is intangible personal property," and held such to be a chose in action. To the same effect see also *Re Elermann's Estate*, 179 Wash. 15, 35 P. 2d 763, text 765. In *Re Boshart's Estate*, 177 N. Y. S. 567, text 575, the court held a contract for the sale of a farm to be a chose in action, and that "the amount owing thereon is personal property," basing its conclusion on *People v. Trustees*, 48 N. Y. 390, text 397, and *People v. Willis*, 133 N. Y. 383, 31 N. E. 225. To the same effect see also *Smith v. Glen Alden Coal Company*, 347 Pa. 290, 32 A. 2d 227, text 232 and *Finkelstein v. Dinnan*, 221 Mich. 493, 191 N. W. 24, text 25, and an opinion of this office of February 1, 1948 (048-60; 1947-1948 AGO 235).

Section 192.03, F. S., defines "personal property" as including "all goods and chattels, money and effects, boats and vessels, *debts due or to become due* from solvent debtors whether on account, contract, note or otherwise. From these authorities it is clear that the right of the vendor, or his assignee, to receive payments under a contract for the sale of real property, is intangible personal property within the purview of Ch. 199, F. S. Section 199.05, F. S., requires that "the tax assessor shall assess all intangible personal property at its full cash value." This requirement is mandatory (see *Owens v. Fosdick*, 153 Fla. 17, 13 So. 2d 700, text 701). As to the meaning and requirement of the term "full cash value" of property for purposes of taxation see our opinion 050-351, of July 21, 1950 (1949-50 AGO 233). In 31 Fla. Jur. 454, §562, it is stated that "being an ad valorem tax, the intangible personal property tax is necessarily computed and fixed according to the value of the intangible. The constitution and statutes of Florida authorize ad valorem taxation of intangible personal property on its just valuation. The text of any valuation formula applied to intangibles is whether or not it arrives at the true taxable value of the property that is, its full cash value." See also 84 C. J. S. 810, §412. The amount appearing to be owing by a purchaser under an agreement for the sale and conveyance would seem to be *prima facie* evidence of its value, subject, however, to the right of the holder of the obligation to show its actual full cash value. The solvency of the purchaser and the security for the payment of the obligation would seem to be material in determining the full cash value of the obligation. The title retained by the vendor in a contract for the sale and conveyance of real property is deemed security for the payment of the purchase price (*McKinnon v. Johnson*, 54 Fla. 538, 45 So. 451, text 453; 4 *Pomeroy's Equity Juris.*, 766, §1260).

The first part of the above question is answered in the affirmative, and the latter part by the determination of the full cash value of the intangible under the rules above mentioned.

061-111—July 17, 1961

TAXATION

TAX EXEMPTION—PARK DEDICATED TO THE USE OF MEMBERS OF NONPROFIT CORPORATION—§1, ART. IX AND §16, ART. XVI, STATE CONST.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Is a tract of land owned by a nonprofit corporation

and designated a park for the use of members of said corporation entitled to exemption from taxation?

The nonprofit corporation in question is an Ohio corporation, owning certain properties in the town of Melbourne Village in this state, designated by said corporation as a park "for the use of members of . . . (the said nonprofit corporation) . . . and not for public use." Under §1, Art. IX, §16, Art. XVI, State Const., and §192.06, F. S., for real property, other than that of the state and its political subdivisions, to be entitled to tax exemption it must "be held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes." Said §1, Art. IX, and §16, Art. XVI, have been construed as limitations "upon the power of the legislature to provide for the exemption from taxation of any classes of property except those particularly mentioned classes specified in the organic law itself" (*L. Maxcy, Inc. v. Federal Land Bank*, 111 Fla. 116, 150 So. 248, text 250; *State v. St. John*, 143 Fla. 544, 197 So. 131, text 134; *State v. Doss*, 146 Fla. 752, 2 So. 2d 303, text 304).

In the light of these authorities for the question to be answered in the affirmative, the park property under consideration must "be held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes." It appears from the file handed us with your request for an opinion that the subdivider when platting the subdivision in question laid out certain areas as parks "to the use of members of American homesteading foundation, and not for public use." It further appears from the file that not all residents of the subdivision are members of the said homesteading foundation. "There are some residents renting property and are not members." Constitutional and statutory provisions for exemption from taxation are construed strictly against the claimant and in favor of the taxing power in cases of doubt (*Orange County v. Orlando Osteopathic Hosp.*, Fla., 66 So. 2d 285, text 287; *Overstreet v. Tubin*, Fla., 53 So. 2d 913, text 915; *Lummus v. Cushman*, Fla., 41 So. 2d 895, text 897).

"Exemptions from taxation are granted by the sovereign only when and to the extent that may be deemed to conserve the general welfare" (*Orange County v. Orlando Osteopathic Hosp.*, supra; *Lummus v. Florida-Adirondack School*, 123 Fla. 810, 168 So. 232, text 237). The court, in *Johnson v. Sparkman*, 159 Fla. 276, 31 So. 2d 863, text 865, said that "property exempt from taxation under the constitution for *charitable and educational purposes* has reference only to such property as is dedicated to the public and used exclusively for that purpose Mere incidental use for such purposes is not enough." Tax exemptions are not based on the favoring of particular persons and corporations at the expense of taxpayers generally, or granted on any idea of individual property owners, but are based on the accomplishment of public purposes, and are granted on the theory that they will benefit the public generally or as a reward or compensation for services rendered in the performance of some function deemed sociably desirable (84 C. J. S. 413, §215; 51 Am. Jur. 510, §504). The court, in *Miami Battlecreek v. Lummus*, 140 Fla. 718, 192 So. 211, text 217, quoted with approval from *Congregational Sunday School, etc. v. Board of Review*, 190 Ill. 108, 125 N. E. 7, text 10, that "the fundamental ground upon which all exemptions in favor of charitable institutions are based is the benefit conferred upon the public by them, and the consequent relief, to some extent, of the burden upon the state

to care for and advance the interests of its citizens." "Exemptions from taxation will be granted by the sovereign only when and to the extent that it may be deemed that such exemptions will conserve the public welfare" (*Lummus v. Cushman*, Fla., 41 So. 2d 895, text 897).

This brings us to the question of whether or not the lands designated as a park or parks are in truth and in fact "held and used exclusively for (some) religious, scientific, municipal, educational, literary or charitable purposes," within the purview of §1, Art. IX, and §16, Art. XVI, State Const. Such a use is cast in doubt by the statement in your file that the park or parks are limited "to the use of members of the American homesteading foundation, and not for public use."

The above question should be answered in the negative unless the owner or owners thereof demonstrate to the satisfaction of the tax assessor that the property is held and used exclusively for one or more of the above mentioned purposes.

061-112—July 17, 1961

LICENSE TAXES

CONSTRUCTION OF §205.18, F. S.—RELIGIOUS TENETS, EXEMPTION—§5 D. R., STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

What is the proper construction to be placed upon §205.18, F. S., which provides that nothing in Ch. 205, F. S., "shall be construed to require a license for practicing the religious tenets of any church?"

Section 5, Declaration of Rights, State Const., provides that "the free exercise and enjoyment of religious profession and worship shall forever be allowed in this state." Under the first amendment to the U. S. constitution, congress may not prohibit the free exercise of religion. These provisions were designed to provide a separation of state and religion in this country. Section 205.18, F. S., providing that nothing in Ch. 205, F. S., the occupational license laws of the state, "shall be construed to require a license for practicing the religious tenets of any church," indicates an intention on the part of the Florida legislature to conform the license tax laws to this policy.

The court, in *People v. Cole*, 219 N. Y. 98, 113 N. E. 790, text 794, had before it a statute exempting from New York's medical practice statute, those persons practicing the religious tenets of their church, which were defined as "the beliefs, doctrines and creeds of the church." In this case the court held that the exemption there in question "relates to the tenets of the church as an organized body as distinguished from an individual. It does not relate to or exempt persons practicing in accordance with individual belief." In this same case it was held that "the religious tenets of a church must be practiced in good faith to come within the exception." When such practice is a fraud or pretense it is not exempted by said statute. The opinion in *People v. Cole*, supra, holds that "a person should not be allowed to assume to practice the tenets of any church as a shield to cover up a business undertaking The operation of the power of spirit must be, not indirect and remote, but direct and immediate. If that were not so, a body of men who claimed divine inspiration might prescribe

drugs and perform surgical operations under cover of the law." To be immune the healer must, in good faith, inculcate the faith of the church as a method of healing.

The *tenets* to which the statute accords exemption, are not merely tenets as such "but the *religious tenets* of a church." The practice of the *religious tenet must itself be the cure*. (State v. Verbon, 167 Wash. 140, 8 P. 2d 1083, text 1086). The immunity is granted to those who practice their religious tenets in such form and use as to be confined to religious means. The use of other means and agencies is not within the exemption. The question of the good faith of a person practicing the religious tenets of his church is largely a question of fact to be determined as questions of fact are usually determined in litigation and similar proceedings. Religious faith is the measure of the exemption, not individual treatment and service (People v. Vogelgesang, 221 N. Y. 290, 116 N. E. 977). In this case the New York court said that things were done by the defendant therein that religious faith would not justify; that he combined faith with patent medicine - if he invoked the power of religion, he did not forget to prescribe his drugs. In People v. Cole, supra, the court said that "a person should not be allowed to assume to practice the tenets of Christian Science or any church as a shield to cover a business undertaking. When a person claims to be practicing the religious tenets of any church, particularly where compensation is taken therefor and the practice is apart from a church edifice or the sanctity of the home of the applicant, the question whether such person is within the exemption should be left to a jury as a question of fact."

In People v. Hickey, 157 Misc. 592, 283 N. Y. S. 969, Hickey was of a church of only 12 members, including him and his wife, likely of his own organization. He purported to be practicing the tenets of his church in the treatment of fallen arches, his treatment consisting of pressing the feet of the patient under the arch, placing the tips of his fingers on the patient's outer garments, and praying. The court found that such practice fell short of being the practice of church tenets in good faith, stating that for one to come within the exemption, his practice of the tenets of his church must be in good faith. Here the defendant took compensation for his services and his practice was apart from the church edifice or the patient's home. This appears to have been considered as raising an issue of good faith, to be presented to a jury as a question of fact of good faith.

Chapter 205, F. S., imposes license taxes on persons engaged in or managing "any business, profession or occupation" in this state. Such a statute has usually been construed as imposing a tax on such businesses, professions and occupations as are carried on in a commercial sense with a view to profit and a livelihood (53 C. J. S. 556, §27; Texas Co. v. Amos, 77 Fla. 327, 81 So. 471, text 472; Cohen v. State, Fla., 99 So. 2d 563, text 564). Section 205.18, F. S., is evidence that the legislature intended to make it clear that it did not consider the practice of religious tenets by a church, including such practice through an agent of the church, as a business, profession or occupation. No person is permitted to operate any business, profession or occupation for *private enrichment* and gain under the cloak of religious tenets. This rule should not be deemed to prohibit voluntary donations to the church or its agents, so long as such donations are not required or made a condition precedent to the practice of the religious tenets.

061-113—July 17, 1961

TAXATION**EXEMPTIONS—DWELLING UNITS OWNED BY NONPROFIT CORPORATIONS FOR OCCUPATION BY RETIRED PERSONS—§7, ART. X, §1, ART. IX AND §16, ART. XVI, STATE CONST.***To: Ray E. Green, State Comptroller, Tallahassee***QUESTION:**

Are dwelling units owned by nonprofit corporations organized or sponsored by civic clubs, held for and rented to retired persons, entitled to tax exemptions?

Although retired persons may make their permanent homes in said dwelling units, the title to said dwelling houses appears to be vested in the nonprofit corporation, so that such retired persons do not have the "legal title or beneficial title in equity to real property in this state" required by §7, Art. X, State Const., to entitle one to homestead tax exemption. There appears to be no other provision for tax exemption of the said dwelling units unless the same may be brought within the provisions of §1, Art. IX, and §16, Art. XVI, State Const., as implemented by §192.06, F. S. For real estate to be entitled to tax exemption under these constitutional and statutory provisions it must be "held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes." The fact that property may be owned and held by a nonprofit corporation or by a social or civic club or organization does not by reason of such ownership entitle such property to tax exemption. It is the property and not the corporate or other entity that is entitled to the exemption (*Lummus v. Florida Adirondack School*, 123 Fla. 832, 168 So. 232; *State v. Doss*, 150 Fla. 486, 8 So. 2d 15, text 16), and property is entitled to tax exemption when held and used exclusively for one or more of the purposes mentioned in the said constitutional provisions.

Our observations in our opinion 061-63, of April 19, 1961, relative to the tax exemption status of nonprofit and other eleemosynary corporations, are applicable here and should be applied in determining whether or not the use of the property in question brings it within said §1, Art. IX, and §16, Art. XVI, State Const., as implemented by §192.06, F. S.

061-114—July 18, 1961

MOTOR VEHICLE LICENSE FEES**CONSTRUCTION OF CH. 57-1744, LAWS OF FLORIDA—FEES PAID TO VETERANS ORGANIZATIONS, ORANGE COUNTY, PURSUANT TO §320.04, F. S.—EFFECT OF 1961 AMENDMENT OF SECTION***To: Ray E. Green, State Comptroller, Tallahassee***QUESTION:**

What fees are payable to veterans' organizations acting as agents of the tax collector for Polk county, under and pursuant to Ch. 57-1744?

Section 1, Ch. 57-1744 authorized the appointment by the tax collector for Polk county of veterans' organizations to act as the collector's agents in distributing motor vehicle license tags and collecting the license fees required. Section 2 of said Ch. 57-1744

provides that "all fees accruing to the Polk county tax collector from the comptroller by virtue of §320.04, shall hereafter accrue to those veterans' organizations acting as agents for the tax collector in the same manner in which said fees would accrue to the county tax collector under §320.04," F. S. At the time of the adoption of said Ch. 57-1744, said §320.04, provided that "there shall be a service charge of *twenty-five cents* for each application which is handled, which service charge shall be collected from the applicant as compensation for all services rendered in connection with the handling of the application. Said fees shall be retained by the tax collector as other fees accruing to the tax collector's office" Said §320.04 was amended by Ch. 61-403, so as to provide that "there shall be a service charge of *fifty cents* for each application which is handled *in connection with the issuance of any license plates, aircraft license, certificate of title, duplicates and transfers*, which service charge shall be collected from the applicant as compensation for all services rendered in connection with the handling of the applications. Said fees shall be retained by the tax collector as other fees accruing to the tax collector's office" The changes made in the quoted portion of said §320.04, by the 1961 legislature are italicized.

The question presented is whether the fees payable to the veterans' organizations acting as agents of the county tax collector in the sale of motor vehicle license tags and the collection of the tax therefor, under and pursuant to Ch. 57-1744, supra, have been increased to 50¢ per each tag sold and tax collected from 25¢, by reason of the 1961 amendment of said §320.04. The reference in Ch. 57-1744, to the fees accruing to the county tax collector and thereby fixing the compensation of the veterans' organization for acting as agents of the county tax collector by reference appears to make it a "reference statute." (30 Fla. Jur. 100 and 101, §9). The purpose and effect of such reference statutes are stated in 30 Fla. Jur. 101 and 102, §10, as follows: "In general, when a statute adopts a part or all of another statute by a *specific and descriptive reference* thereto, the adoption takes the statute as it exists at that time. It does not, absent an express declaration to that effect, include subsequent additions or modifications of the adopted statute. Both statutes coexist as separate and distinct enactments, each having an appointed sphere of action. Alteration, change or repeal of the one does not affect the other, unless the language of the adopting statute so indicates When, however, the adopting statute makes no reference to any particular statute or part of statute by its title or otherwise, *referring only to the law generally* that governs a particular subject, the reference in such a case includes not only the law in force at the date of the adopting act, but also subsequent laws on the particular subject referred to, so far at least as they are consistent with the purpose of the adopting act." (To the same effect see also 50 Am. Jur. 58 and 59, §39; 82 C. J. S. 847 and 848, §370; annotations in 168 A. L. R. 627-636 and 2 L. ed. 1048-1050).

In *Williams v. State*, 100 Fla. 1567 and 1570, 125 So. 358 and 131 So. 864, the above rule as stated in 30 Fla. Jur. 101-102, §10, was recognized and approved. In this case, §2899, R. G. S., provided that the "fees of constables shall be the same as are allowed for sheriffs for like services," and §2891, R. G. S., provided that "the compensation of sheriffs shall be entirely by fees, which shall be as follows, . . . (setting out in specific detail the fees allowed for

each service)” However, said §2891 was in effect amended by Ch. 10091 and 12021, 1925 and 1927, changing the fees in most instances payable to sheriffs. The court held that the reference to sheriffs’ fees in §2899, was to §2891, and that its reference did not extend to the amendments made by the 1925 and 1927 enactments as to sheriffs’ fees. In *State v. Harllee*, 100 Fla. 1562, 131 So. 866, §3384, R. G. S., it is provided that the “fees of justice of the peace shall be the same as those of the clerk of the circuit court for similar services,” which reference was held to be to §3084, R. G. S., as originally adopted and not as amended by Ch. 11893, 1927. In these cases the court appears to have treated the references by one statute to another, as “specific and descriptive references,” and not general references, within the rule announced in 30 Fla. Jur. 101-102, §10 above. It was stated in *Van Pelt v. Hilliard*, 75 Fla. 792, 78 So. 693, text 698, that reference statutes and the statutes to which they refer “exist as separate, distinct, legislative enactments, each having its appointed sphere of action, and the alteration, change, or repeal of one does not operate upon or affect the other.” In substance we may say with the court in *O’Flynn v. East Rochester*, 292 N. Y., 156, text 162, 54 N. E. 2d 343, text 346, that the “question whether one statute absorbing or incorporating by proper reference provisions of another will be affected by amendments made to the latter is one of legislative intent and purpose.”

Had Ch. 57-1744 provided, as did the statutes involved in *Williams v. State* and *State v. Harllee*, supra, that the fees of the veterans’ organizations shall be the same as are allowed the county tax assessor for like services, then it would seem that subsequent changes of §320.04 would not be included or applicable. However, the language actually used is that “all fees *accruing* to the Polk county tax collector, from the comptroller by virtue of §320.04, shall *hereafter accrue* to those veterans’ organizations acting as agents for the tax collector in the same manner in which said fees would accrue to the county tax collector under §320.04.” The command of the legislature is not that the fees of the agents shall be the same as are paid the tax collector, but that the fees accruing to the tax collector shall hereafter accrue to the veterans’ organization. The term “accrue” to the tax collector means the funds payable to the tax collector as fees upon the sale of a motor vehicle tag. The reference is to moneys the tax collector becomes entitled to upon issuing a motor vehicle tag and license. The command of Ch. 57-1744 is that funds *accruing* to the tax collector because of the sale of a motor vehicle license and tag are, after the adoption of said Ch. 57-1744, to accrue to the veteran’s organization making the sale as agent of the county tax assessor. However, the reference is to accruals under and pursuant to a particular law, that is, §320.04, F. S.

Although legal authorities may well differ as to the application of the rule mentioned in 30 Fla. Jur. 101 and 102, §10, aforesaid, to the reference in Ch. 57-1744 to §320.04, as to whether a general or a specific and descriptive reference, we must conclude that in our opinion the same is a specific and descriptive reference, and not a general reference, so that we must hold that the fees accorded to veterans’ organizations under Ch. 57-1744 are those accorded tax collectors under §320.04, as the same existed in 1957 when said chapter was adopted and not as subsequently amended. The fees are 25¢, and not 50¢; the difference of 25¢ allowed under the

1961 amendment of §320.04, accrues to the tax collector's office. This seems to answer the above stated question.

061-115—July 19, 1961

TAXATION

PERSONAL PROPERTY OF NONRESIDENT MILITARY PERSONNEL ASSIGNED TO SERVICE IN FLORIDA

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

When is the personal property, both tangible and intangible, owned by members of the armed forces of the U. S., found, used or held in Florida, subject to ad valorem and license taxes imposed under the Florida statutes and laws?

Our opinion 060-189, of Nov. 28, 1960, (1959-60 AGO 746-748), considered this question as specifically applied to boats and vessels owned by members of the armed forces of the U. S., found or used in Florida, which opinion is hereby extended to the personal property, both tangible and intangible, of such personnel and applied to the above stated question.

Some reference is made in the file handed us with the said request for opinion to motor vehicle trailers and house trailers, evidently when used for housing purposes. The same rule would be applicable to such trailers unless and until they should, by being permanently attached to real property, become part and parcel of the realty and subject to taxation as such. *The temporary location* of a trailer on lands of another, whether by lease or license, and its use by military personnel as housing for his family, should not be deemed to make the same realty, even when attached to water, gas and sewer mains or lines.

This rule does not seem to apply to military personnel who are or become legal citizens or permanent residents of the state.

061-116—July 19, 1961

COUNTY OFFICIALS—OFFICES—REGULATIONS

COMPENSATION OF OFFICIALS, RESIGNED, APPOINTED

To: *Bryan Willis, State Auditor, Tallahassee*

STATEMENT OF FACTS:

A county official's resignation was accepted, effective Jan. 13. His successor was not commissioned until Jan. 20, but did not receive the commission at once and did not assume the duties of the office until Jan. 25. The resigned official operated the office through Jan. 24. Earnings of the office were more than sufficient to pay the official's maximum compensation.

QUESTIONS:

1. What is the last day for which the resigned official is entitled to compensation?
2. What is the first day for which the incoming official is entitled to compensation?

An office is deemed to be vacant on the effective date of said resignation, assuming that said resignation was duly accepted (In re Advisory Opinion to the Governor, 158 So. 441; *State v. Lunsford* 192 So. 485). The payment of compensation is incidental to the lawful title or right to an office and belongs to the officer as long as he holds such an office (26 Fla. Jur., Public Officers, Section

141). It has been held that where an officer under color of title continues in the exercise of the functions and duties of the office after his authority to act has ceased, he is an officer *de facto* (43 Am. Jur., Public Officers, §484, pp. 235, 236). It has also been stated that there is no difference between the acts of a *de facto* and *de jure* officer so far as the public and third persons are concerned, such principle being based upon public policy for the protection of those having official business to transact and to prevent the failure of public justice (26 Fla. Jur., Public Officers, §184).

An examination of the legal authorities concerning the payment of compensation to *de facto* officers reveals a divergence of views on this matter (93 A. L. R. 258 et seq. and 151 A. L. R. 952 et seq.). The holdings are divided into several classifications. There are cases holding that a *de facto* officer is not entitled to salary where there is a *de jure* officer as well as where there is not a *de jure* officer. Still other cases hold that it makes no difference whether there is or is not a *de jure* officer, a *de facto* officer is entitled to salary where he has acted in good faith and performed the duties pertaining to the office. Apparently, the courts of this state have not as yet specifically passed upon this question.

While omitting reference to the question of *de facto* status, the supreme court of Florida held that a state officer was entitled to compensation for services performed during the interim between the acceptance of his resignation and the appointment of his successor. (*State v. Lee* 3 So. 2d 497). This holding was apparently influenced by the specific statutory provisions relating to such office. However, the court in citing other authorities recognized the importance of an incumbent retaining his office until his successor took over. It was indicated that the public should not suffer from a vacancy in a public office and the office should always be filled so that there will always be someone competent to fulfill the duties belonging to the office. It was further stated that "one who holds over until his successor is qualified continues as the incumbent in the office, although he has formally resigned and his resignation has been accepted." Applying the foregoing comments to question 1, it would seem that as of Jan. 13 a vacancy existed for the purpose of appointing another person to fill it (§114.01, F. S.), although such office was not in reality physically vacant.

Your inquiry indicates that the successor was commissioned on Jan. 20 and the assumption of duties began on Jan. 25. A commission has been defined as written authority from a competent source given to the officer as his warrant for the exercise of the powers and duties of the office for which he was commissioned (26 Fla. Jur., Public Officers, §51). While it has been held that the commission is merely evidence of the appointment and not the appointment itself, there may be instances where they may seem inseparable because of difficulty of showing the appointment other than by showing existence of the commission (26 Fla. Jur. supra., §51). Generally, it may be said that a contemplated office holder acquires no substantial right as an appointee *until* a commission is granted (*State ex rel Flemming v. Crawford*, 28 Fla. 44, 10 So. 118, 14 L. R. A. 253). Furthermore, it has been held that a commission is essential to the completion of an *appointment* as distinguished from the case of an *election*. (42 Am. Jur. supra., §116).

Based upon the rationale in *State v. Lee*, supra., and the foregoing cited authorities and taking into consideration the particular circumstances presented in your inquiry it would appear that the

resigned official is entitled to compensation through Jan. 24, since he acted in good faith and performed the duties pertaining to the office even though acting in a *de facto* status. Although the incoming official's right to his office was established on Jan. 20, the date his commission was granted, since he did not assume his duties until Jan. 25, the said official would be entitled to compensation as of Jan. 25.

As you will note, there are many problems both practical and legal that arise in situations such as you have described. Therefore, my comments have been restricted as closely as possible to the factual situation presented in your inquiry. The complexities of such problems as well as the contrariety of judicial opinion limits me from prescribing any fixed rule of law applicable to all situations. It would seem that the ultimate determination of this and similarly related problems will have to be left to the courts.

061-117—July 19, 1961

REGULATION—PROFESSIONS AND VOCATIONS
FUNERAL DIRECTOR OR EMBALMER—ELIGIBILITY TO
INCORPORATE UNDER PROFESSIONAL SERVICE COR-
PORATION ACT—CH. 61-64, LAWS OF FLORIDA,
(CH. 621, F. S.)—CH. 470; §470.10(5), F. S.

To: *Lawton M. Chiles, Jr., State Representative, Lakeland*

QUESTION:

Does Ch. 61-64, authorizing the creation of professional service corporations, permit the formation of a corporation to engage in the business of funeral directing or embalming in the light of §470.10(5), F. S.?

Under the current provisions of Ch. 470, F. S., persons may be licensed to carry on the profession of funeral directing or embalming. According to the provisions of §1, Ch. 61-64, it was the intent of the legislature "to provide for the incorporation of an individual or group of individuals to render *the same professional service to the public for which such individuals are required by law to be licensed* or to obtain other legal authorization." In statutory construction legislative intent is the pole star by which the courts must be guided (*Ervin v. Peninsular Tel. Co.*, Fla. 53 So. 2d 647, *Smith v. Ryan*, Fla., 39 So. 2d 281, and *Fla. State Racing Comm. v. McLaughlin*, Fla., 102 So. 2d 574). It appears that §470.10(5), F. S., was enacted in 1945 because "the legislature realized that embalming and funeral directing is a profession and that it should not be engaged in by a corporation any more than should the practice of law or the practice of medicine. . . ." See AGO 058-226, p. 769 of the 1957-58 biennial report of the attorney general. It is to be noted that the practice of law, medicine and other similar professions are specifically mentioned in Ch. 61-64 as now being eligible for incorporation. It is a generally accepted rule of statutory construction that two acts relating to the same subject matter should be construed so as to preserve the force and effect of each without destroying their evident intent (*Ellis v. City of Winter Haven*, Fla., 60 So. 2d 620. However, to the extent that there is an irreconcilable repugnancy the later general act should supersede the earlier act. *International Paper Co. v. Merchant*, Fla., 77 So. 2d 622, and *DeConingh v. City of Daytona Beach*, Fla., 103 So. 2d 233).

Considering the intent and purpose of Ch. 61-64 and the reason for the original enactment of §470.10(5), F. S., and the authorities set out herein, this office is inclined toward the position that Ch. 61-64 now authorizes the formation of a corporation to engage in the business of funeral directing or embalming. Provided, however, that such corporation must comply with all of the provisions of and limitations contained in Ch. 61-64, relating to professional service corporations.

Your question is therefore answered in the affirmative.

061-118—July 24, 1961

**STATE INSTITUTIONS OF HIGHER LEARNING
APPROPRIATIONS FOR NUCLEAR STUDIES AND RE-
SEARCH—EFFECT OF CHS. 61-401 AND 61-516, LAWS
OF FLORIDA, ON §241.66, F. S.**

To: State Board of Control, Tallahassee

QUESTION:

**What portion, if any, of §241.66, F. S., was repealed
by Chs. 61-401 and 61-516?**

Section 1 of Ch. 61-516, (S. B. 63) repealed certain specified sections and parts of sections of the Florida Statutes, specifically repealing subsection (4) of §241.66, F. S., making no mention or reference to other subsections of said §241.66. It is clear that said Ch. 61-516 left standing the remaining subsections of said §241.66.

Section 282.071, F. S., as added to Ch. 282, F. S., was inserted in the Florida Statutes by §1 of Ch. 61-401 (S. B. 673), which section provided that "Chapter 282, F. S., is amended by adding the following sections to read" as therein set out. Said Ch. 61-401 added §§282.021 - 282.091, to Ch. 282, F. S. Chapter 282, F. S., was set apart in 1941 for use where statutes relate to biennial appropriations acts, including laws supplemental thereto. In §282.021, F. S., as added by said Ch. 61-401, certain terms used in said Ch. 282 are defined and set out, of which we note subsections (10) and (11). Subsection (10) defines the term "appropriation" and subsection (11) defines the term "continuing appropriation."

We have also examined the title to said Ch. 61-401, and find that it relates to appropriations generally and makes no mention of continuing appropriations. A general reading of the said act leads to the conclusion that §282.081, as added by Ch. 61-401, was intended to relate to appropriations generally which are limited to expire within a specified time, and that there was no intention to include therein continuing appropriations.

It is, therefore, our construction that the reference to appropriations contained in §282.081, as added aforesaid, and to the balance thereof, relate to biennial and similar appropriations having a fixed time for expiration, and not to continuing appropriations, such as §241.66, relating to nuclear studies and research in the state university. In the light of the above and foregoing, we find that only §241.66(4), F. S., was repealed by either Ch. 61-401 or 61-516.

This answers the above stated question.

061-119—July 26, 1961

TAXATION

TAX DEEDS—DUTY OF CLERK OF CIRCUIT COURT TO
ACCEPT APPLICATIONS—APPLICANT OWNER OF
RECORD—§§194.15, 193.11, 193.21, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Should a circuit court clerk accept application for tax deed from an applicant who is the owner of record where the property is being assessed in the name of another, who by extrinsic evidence is known to be the owner through an unrecorded deed?

In AGO 057-140, June 1, 1957 and AGO 057-119, May 8, 1957, this office pointed out that real estate taxes are levied against the realty itself and not against the owner of such realty. Nevertheless, it appears from our Florida Statutes that the tax assessor in preparing the taxing records, such as the tax assessment roll, is under some obligation to ascertain the true owner of the property being assessed. For instance, §193.11, F. S., sets the time when tax returns are to be made by "owners." Section 193.21 directs the county assessor to assess lands which have not been returned for taxation in the name of the last known "owner."

In your letter you state that the original owner, a Mr. Patterson, sold some properties but that the deeds involved have never been recorded by the grantees. Mr. Patterson, however, brought to the tax assessor a list of the parcels of land sold with the names of the grantees; and the tax assessor made corresponding changes in the tax roll. Mr. Patterson subsequently purchased a tax certificate, paying taxes due on one of these properties. When he applied for tax deed you, as clerk, found that he, the tax deed applicant, was still the owner of record.

The owner of record is not necessarily the true owner of realty, as there may be an outstanding unrecorded deed which is valid as between the parties to that conveyance. Recordation puts the public on constructive notice of the matters contained within the recorded instrument (Ch. 695, F. S.), but recordation does not operate to convey title (*Van Eepoel Real Estate Co. v. Sarasota Milk Co.*, 100 Fla. 438, 129 So. 892). An unrecorded instrument is valid against all except creditors or subsequent purchasers for valid considerations without notice.

In AGO 050-455, Sept. 27, 1950, we made the following remarks:

... We find nothing in the statutes and laws of this state requiring, or even contemplating, that the clerks of the circuit courts shall act judicially in the issuance of tax deeds and determine such legal questions. The determination of the validity of a tax sale certificate, when the invalidity does not appear from the said certificate or the tax proceedings, from evidence dehors the record, does not appear to be one of the duties of a clerk in connection with applications for tax deeds. The determination of the validity of tax sale certificates under such circumstances appears to be judicial questions that should be determined by the courts upon proper proceedings....

In the light of these observations we feel that it is

the duty of a clerk of the circuit court to accept applications for tax deeds, unless the invalidity of the tax sale certificate in question is apparent from its face or from the taxing records, notwithstanding any other personal knowledge on his part which indicate, from matters dehors the record, that there may be some question of the tax sale certificate in question

The fact that Mr. Patterson is the record owner of the property in question would seem to raise a rebuttable presumption that he is the true owner. However, this presumption could be overcome by Mr. Patterson's affidavit stating that he is not the true owner, giving the name and address of his grantee and the date of the conveyance. This affidavit should be placed in the tax deed application file, and Mr. Patterson should also be permitted to place the aforementioned affidavit on record in the deed book so as to clarify any future questions concerning the title.

Your question is answered in the affirmative.

061-120—July 28, 1961

TAXATION

DOCUMENTARY STAMP TAXES—DEEDS OF EXCHANGE— §201.02, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Is a deed conveying real property in exchange for other real property, by the same or separate deeds, subject to documentary stamp taxes under §201.02, F. S.?

Section 201.02, F. S., imposes documentary stamp taxes, in the amount therein set out, "on deeds, instruments or writings, whereby any lands, tenements, or other realty, or any interest therein, shall be granted, assigned, transferred or otherwise conveyed to or vested in the purchaser, or other person at his direction." The tax so imposed is 20c "on each \$100 of the consideration therefor." This section was derived from one of the paragraphs of §1, Ch. 15787, 1931, which in turn was taken substantially from paragraph 5 of the schedule "A" in §807 of the federal revenue act of 1924, which provision now appears as §4361, title 26, of the U. S. code. It was held in *Gay v. Inter-County Tel. and Tel. Co.*, Fla., 60 So. 2d 22, text 23, and *State v. Cook*, 108 Fla. 157, 146 So. 223, text 224, that this statute, having been taken substantially from a federal statute on the same subject "takes the same construction in the Florida courts as given to the federal act in the federal courts." 1961 federal tax regulation 43.4361-2, provides that "a conveyance of realty in exchange for other property; also the conveyance of the other property, if it is realty," is subject to the federal tax.

"An exchange of land is a mutual grant of equal interests, the one in consideration of the other." (26 C. J. S. 589, §5, note 6). Deeds have been held to be supported by a sufficient consideration where there has been "the execution of one conveyance for another" or the "exchange of deeds" (26 C. J. S. 612, §17, notes 6 and 6.5). "In law an exchange is recognized as two sales, or a double sale, and an exchange of real estate is as to each one of the parties a sale and purchase of property" (33 C. J. S. 5, §1). "The exchange of one article for another imports a consideration The transfer by one party of his property constitutes a consideration for the

transfer by the transferee of his property to the other party" (33 C. J. S. 9, §3). In the case of an exchange of lands by two owners, the land conveyed in consideration of the conveyance by the other owner is a sufficient consideration to support the transaction. "When taxes are levied according to a monetary consideration, the law contemplates that the tax should be confined to the actual monetary considerations or to considerations having a reasonably determinable pecuniary value" (De Vore v. Gay, Fla., 39 So. 2d 796, text 797).

In an exchange of real property by the respective owners of the property exchanged, there is a consideration passing from one party to the other; lands are given as consideration for the transfer of other lands between the parties. Section 201.02, F. S., imposes a tax upon each \$100 of the consideration for the transfer of real estate conveyed in this state. We have here a *consideration having a reasonably determinable value* (De Vore v. Gay, supra). The value of either parcel of land exchanged for the other may be determined from available evidence. In Culbreath v. Reid, Fla., 65 So. 556, the consideration passing from the grantee to the grantor was "love and affection," not capable of reasonable valuation, if subject to valuation at all in monetary terms. In the case of real estate exchanged for other real estate, either parcel of real estate is subject to determination of its value. Either parcel of land is a valuable consideration for the transfer of the title to the other parcel of land.

We, therefore, answer the above stated question in the affirmative.

061-121—July 28, 1961

SHERIFFS

FEES IN CIVIL CONTEMPT PROCEEDINGS—COLLECTION— §§30.23-30.25, 30.40 AND 30.51(2), F. S.

To: Bryan Willis, State Auditor, Tallahassee

QUESTIONS:

1. In connection with a civil contempt of court proceeding, should the sheriff charge the fees provided in §§30.23, 30.24, 30.25 and 30.45, F. S.?

2. Before serving the court's rule to show cause order in such proceeding, should the sheriff collect such fees or a deposit to cover them from the plaintiff under the provisions of §30.51(2), F. S.?

A "contempt" may be defined or described as a disobedience to the court, an opposing or despising of the authority, justice or dignity thereof, and it commonly consists in a party's doing otherwise than he is enjoined to do, or in not doing what he is commanded or required to do, by the process, order or decree of the court.

A "criminal contempt proceeding" is between the public and defendant, is not directly a part of the original cause and involves punishment for offense against the court itself as distinguished from the commission of an act in derogation of the rights of a party to the cause.

A "civil contempt proceeding" naturally involves in some measure a transgression against dignity of court and proceedings of its order, but is in actuality a proceeding between the parties to a cause and is instituted and tried as part of the main case.

In an appropriate civil contempt case, the court may compel performance of a required act by coercive imprisonment, or in the event that violation of the decree has resulted in damages to the injured party a "compensatory fine" may be assessed, to be paid by the wrongdoing party to the party injured (*South Dade Farms v. Peters*, 88 So. 2d 891. See also *Demetree v. State*, 89 So. 2d 298; *Dykes v. Dykes*, 104 So. 2d 598).

Contempts are neither wholly civil nor criminal. It may not always be easy to classify any act as belonging to either of these two classes, as it may partake of the characteristics of both. It is not the fact of punishment, but rather its character and purpose that often serves to distinguish between the two classes of cases. For civil contempt, the punishment is remedial, and for the benefit of the complainant. For criminal contempt the sentence is punitive to vindicate the authority of the court.

In the absence of a controlling statute it appears that the general rule is that in civil contempts, if the defendant is found guilty of contempt, the costs should be taxed against him, but, if discharged, against the complainant.

It has been held that the cost of contempt proceedings cannot be charged to the contemptnor, they must be paid from the fine, where a fine is proper (17 C.J.S., Contempt, 127. See also 12 Am. Jur., Contempt, 79).

Section 30.51 (2), F. S. requires that the sheriff collect either the fees authorized or deposits sufficient to cover them in advance from the party who requests the service.

It is my opinion that the sheriff should collect from a party requesting service of a rule to show cause order on the defendant named therein in connection with a civil contempt proceeding, either the fees, or a deposit sufficient to cover them, authorized in §30.23, F. S., for the service of civil process by the sheriff.

It does not appear that fees or deposits covering expenses of the sheriff authorized by §§30.24 and 30.25 should be required of the contemptnor.

It is to be noted that the above comments are applicable in the absence of an order of a court of competent jurisdiction to the contrary.

061-122—August 1, 1961

TAXATION

DOCUMENTARY STAMP TAXES—DEEDS TO AND FROM FEDERAL AGENCIES—INSURED LOANS

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTIONS:

1. Where a mortgage is guaranteed under the Serviceman's Readjustment Act of 1944 (a so-called VA mortgage) and title is acquired by the mortgagee (by foreclosure or deed in lieu of foreclosure) and thereupon conveyed by the mortgagee to the Administrator of Veterans' Affairs pursuant to the contract of guaranty, is the deed effecting such conveyance subject to State of Florida documentary stamp taxes?

2. Where a mortgage is insured under the National Housing Act (a so-called FHA mortgage) and title is acquired by the mortgagee (by foreclosure or deed in lieu of foreclosure) and thereupon conveyed to the Fed-

eral Housing Commissioner pursuant to the contract of insurance, is the deed effecting such conveyance subject to State of Florida documentary stamp taxes?

Under the federal statutes relating to mortgage insurance (§§1701 to 1750jj, title 12, U. S. code) and veterans' assistance in the purchase of housing, etc. (§§1801 to 1824, title 38, U. S. code) the statutes require that before the guarantee obligation of the government is to be carried out, title to either the mortgage and obligation secured by it, or in case a foreclosure has been had and title to the mortgaged property has vested in the mortgagee, or his assignee, the title secured under the foreclosure be transferred to the federal agency making the guarantee. These requirements seem to be mandatory under the federal statutes and a condition to the carrying out of the government's guarantee of the loan amount. For example, in §1710 of said title 12, it is provided in part that "upon (1) the prompt conveyance to the commissioner of the title to the property which meets the requirements of rules and regulations of the commissioner in force at the time the mortgage was insured, and which is evidenced in the manner prescribed by such rules and regulations, and (2) the assignment to him of all claims of the mortgagee against the mortgagor or others, arising out of the mortgage transaction or foreclosure proceedings . . ." Like or similar provisions are contained or adopted in other applicable sections of the federal statutes relating to guaranteed or insured loan and mortgage obligations.

The above provisions and proceedings, required as a condition to the carrying out of the federal government's guarantee or insurance obligations under the above mentioned federal statutes, are proceedings provided for the enforcement of a federal obligation in the nature of a federal instrumentality, that is the guarantee or insurance obligation. These transactions required of the mortgagee or his assignee are in connection with the guaranteed or insured loan in which the federal government has an interest, which may be said to be, or to be in the nature of, a federal instrumentality. The fact that the transfer of the title to the mortgaged property passes directly from the mortgagor to the federal government, instead of from the mortgagor to the mortgagee and from him to the federal government, makes the transaction no less one under the dictates of the federal statutes.

In the light of the above and foregoing, the above stated questions are answered in the negative.

061-123—August 2, 1961

COUNTY OFFICERS—ORGANIZATION—REGULATIONS
EFFECT OF CH. 61-461, LAWS OF FLORIDA, ON COMPEN-
SATION OF COUNTY JUDGE SERVING IN CAPACITY
AS JUVENILE JUDGE; §145.061, F. S.

To: W. H. Brewton, County Judge, Dade City

QUESTION:

Does the amount of compensation appearing in Ch. 61-461, pertaining to compensation of county judges, include compensation of county judges received as judges of the juvenile courts?

Careful examination of Ch. 61-461 fails to reveal any mention therein of the compensation which a county judge receives in his

capacity as juvenile judge. In construing a statute, effect must be given to its plain language. *Seaside Properties, Inc. v. State Road Dept.*, 121 So. 2d 204.

Whenever legislative intent can be ascertained or determined by language used in the statute considered in its ordinary and grammatical sense, rules of statutory construction are unnecessary. *State ex rel Southern Roller Derbies v. Wood*, 199 So. 262, 145 Fla. 296. See also AGO 058-276, 1957-58 biennial report of attorney general.

Your question is therefore answered in the negative.

061-124—August 2, 1961

FORECLOSURE OF MORTGAGES

FEE OF CLERK—SALE OF SEVERAL PARCELS OF REAL ESTATE MORTGAGES ON WHICH FORECLOSED IN ONE ACTION—§702.02(2), (3), F. S.

To: *Avery W. Gilkerson, Clerk of the Circuit Court, Clearwater*
QUESTION:

Where several mortgages held on several parcels are foreclosed in one proceeding and the clerk of the circuit court is directed by the final decree of foreclosure to sell each parcel separately and issue separate certificates of title, is the clerk authorized to collect a separate fee for each of the sales under the provisions of §702.02 (2), F. S.?

You point out that recently a suit was filed in the circuit court of Pinellas county in which the plaintiff sought to foreclose in one proceeding seven separate mortgages against seven different properties in the same subdivision. Each lot was owned by a different party. You further point out that in the final decree of foreclosure, the clerk of the court was directed to sell each parcel separately and issue seven separate certificates of title.

Section 702.02(2), F. S., fixes the duties of the clerk in connection with the public sale of mortgaged property in final decrees of foreclosure. In addition, said subsection provides: "For his services in making such sale, the clerk shall receive five dollars." While I held that the fee of the clerk pursuant to §702.02 (2) is intended to compensate the clerk for all duties required in connection with the making of such sale (AGO 054-26, biennial report of the attorney general, 1953-54, it would appear, however, that where several *distinct* sales are held the clerk would be authorized to receive a separate fee for each individual sale. As you indicate, the final order in said proceeding directed such sales to be made separately and the fact that they arose pursuant to one proceeding would not preclude the clerk from receiving a separate fee. It should be noted that a "certificate of sale" required to be filed by the clerk after a sale of mortgaged property pursuant to §702.02 (3) contains the following recitation: "I have received my fee of five dollars for making *this sale*, same being paid by...." This would further indicate that the clerk is authorized to receive a separate fee for each sale. It should also be noted that had the mortgagee elected to foreclose each property individually in separate actions, there would be no question as to the right of the clerk to receive a separate fee in connection with the sale in each of such actions.

It is my opinion, therefore, that where the clerk of the circuit

court is directed to make individual public sales and issue separate certificates of title pursuant to a single decree of foreclosure, he would be authorized to receive a separate fee for each sale transaction.

Your question is, therefore, answered in the affirmative.

061-125—August 4, 1961

PUBLIC OFFICIALS

CHANGING OF NAME OF FEMALE OFFICIAL BY MARRIAGE DURING TERM OF OFFICE

To: *Travis A. Gresham, Jr., Attorney, Board of County Commissioners, Fort Myers*

QUESTION:

What procedure should be followed when a female changes her name through marriage or other legal process during her term as a public officer?

As this office previously advised the law appears to be somewhat uncertain in this area. On one occasion the secretary of state was advised that insofar as notaries public were concerned a female could continue to act under the same name under which her commission was originally issued should she desire to do so or if it be her wish she could surrender her commission and be re-commissioned in her married name. See attorney general's opinion dated Feb. 16, 1933, p. 582 of the 1933-34 biennial report of the attorney general. While a notary is a public officer and the commissioning of notaries and other public officers is similar, it must be borne in mind that the commissioning of elected public officials in most instances is based upon an appropriate certificate of election filed by the supervisor of registration with the secretary of state after the election. Thus, there appears to be no authority on which the governor could order the secretary of state to issue a new commission merely for the purpose of reflecting a change in personal status of the officer in question.

A similar question was raised in 1930 when Mrs. R. L. Eaton, a widow, was nominated by the democratic party to fill the unexpired term of her husband as a member of the Florida railroad and public utilities commission. She subsequently ran for re-election in November, 1930, but between the time of her November election and her January, 1931, installation, she married A. B. Green and the question arose as to whether she should be commissioned under her married name or under the name which appeared on the certificate of election. The question was presented to this office and Attorney General Fred Davis ruled that it was his personal inclination that "the law should expressly permit a married woman to be commissioned under her newly acquired married name in such a case. But I doubt the legality of doing so under the present laws of Florida ..." He further stated in the same opinion, "The question, however, is one in my judgment which is of sufficient interest to have settled by higher authority than myself, and consequently, I suggest that the matter be called to the attention of the governor so that he can request an advisory opinion of the supreme court on the subject, which will serve as a precedent for this and all future cases of like character." See attorney general's opinion, dated Dec. 11, 1930, p. 194 of the 1929-30 biennial report of the attorney general. Unfortunately, the matter apparent-

ly never was referred to the supreme court and hence there is no decision of that body available to serve as a precedent in this instance. It is interesting to note that the records of the secretary of state's office do reflect that she was commissioned as Mamie Eaton Green and it is possible that the secretary of state may have followed the rule that a married woman's legal name is her own christian name and her husband's surname (45 C. J. 368, §5; 38 Am. Jur. 600, §10; annotations: 35 A.L.R. 417-419) or, as stated in *Carlton v. Phelan*, Fla., 131 So. 119, the law recognizes one christian name or given name and one family surname; at marriage, the wife takes the husband's surname but otherwise her name is not changed.

Following these authorities and realizing the difficulty with which we are faced in connection with changing a commission once issued, and also the necessity of paying a commission fee and other fees every time a new commission is issued, this office is inclined toward the position that it would be appropriate under the circumstances for a female officer who marries during the term of her office to file, with the secretary of state, a copy of the marriage certificate indicating her married name so that the secretary of state may make an appropriate marginal entry on their copy of the commission. In turn, it would then be appropriate for the secretary of state to issue to the officer in question a certificate in duplicate indicating that they have on record a document showing that the officer's name has been changed from her maiden name and reflecting the appropriate married name. One copy of said certificate should then be attached to and filed with the officer's personal copy of the commission so she could establish that she was a duly commissioned officer should the question arise. The duplicate copy should be forwarded to the bonding company so that they would thereafter be on notice of the officer's change in marital status. Henceforth the officer could sign all official documents and records under her married name. The officer could, out of an abundance of caution, follow the signing of her married name with the word "nee" and her maiden name.

Your question as set out above is answered accordingly.

061-126—August 4, 1961

COUNTY JUDGE

FEE IN INSANITY PROCEEDINGS—§§36.18(3) and 394.23(1),
F. S.

To: *Bryan Willis, State Auditor, Tallahassee*

QUESTION:

Should a county judge in a county of more than 175,000 population charge the fee of \$5 provided in §36.18(3), F. S., or should he charge the fee of \$7.50 provided in §394.23(1), F. S.?

My predecessor in office determined that the fee of the county judge in connection with proceedings to have a person adjudicated mentally incompetent was \$7.50. AGO 048-260, dated Aug. 5, 1948, addressed to the Hon. Curtis D. Earp, judge of the county court, Madison, reads as follows:

Chapter 20504, paragraph 2, laws of Florida, 1941, fixes the fee of county judge at \$2 for each of said cases. This was amended by Ch. 23157, 1945, so that now the fee

of a county judge is the sum of \$7.50 for each said case.

Examination of the legislative history of §§36.18 (3) and 394.23 (1), F. S., indicates that §394.23 (1) is the latest expression of the legislature on this subject. Inasmuch as the two sections relating to the fee of the county judge in connection with insanity proceedings are in irreconcilable conflict as to the amount of the fee, it is my opinion that the latest expression of the legislature, viz., §394.23 (1), would, in the absence of a population act to the contrary, be controlling; and that the fee of the county judge in connection with a proceeding to have a person adjudicated to be physically or mentally incapacitated is \$7.50 in all counties and \$5 in those cases where it is sought to remove the physical or mental incapacity of a person previously so adjudicated. (See *Ideal Farms Drainage Dist. v. Certain Lands*, 19 So. 2d 234; 154 Fla. 554. *Johnson v. State*, 27 So. 2d 276; 157 Fla. 685.)

061-127—August 7, 1961

REGULATION OF TRADE AND COMMERCE

RETAIL INSTALLMENT SALES—MODERNIZATION, REPAIR, ETC., ON REAL PROPERTY—§§520.31(1), (3), 520.34 (11); PART II, CH. 520, F. S.; CH. 61-398,
LAWS OF FLORIDA

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are the purchase of goods and employment of services in connection with the modernization, rehabilitation, repair, alteration, improvement and construction of buildings upon real property, within the purview of the retail installment sales law when payable in installments by the purchaser?

Under §520.31(1) and (3), F. S., as amended by Ch. 61-398, "personalty which is furnished or used, at the time of sale or subsequently, in the modernization, rehabilitation, repair, alteration, improvement or construction of real property as to become a part thereof, whether or not severable therefrom," and "work or labor furnished in connection with the modernization, rehabilitation, repair, alteration, improvement or construction upon or in connection with real property," was brought within the retail installment sales law where the said law would otherwise be applicable to such improvements of real property.

Under §520.34(11), F. S., as added by Ch. 61-398, certain rules and regulations as to the buyer and the seller are provided "in retail installment transactions involving the modernization, rehabilitation, repair, alteration, improvement or construction of real property." A retail installment transaction "means a contract to sell or furnish or the sale of or the furnishing of goods or services by a retail seller to a retail buyer pursuant to a retail installment contract . . ."

The said amendments made by Ch. 61-398 relate to the modernization, rehabilitation, repair, alteration, improvement or construction of real property, in such a manner as to cause it to become a part of the realty, or upon or in connection with real property. The amendment seems to have contemplated retail installment transactions as to services or goods to be used in the modernization, repair, alteration, improvement or construction of real prop-

erty, where such services and goods become part and parcel of the real property improved and lose their identity as tangible personal property. The fact that goods and services furnished by a seller to a buyer are used in the improvement of real property, in such manner as to become part and parcel of the realty, will not prevent their sale from being a retail installment sale when otherwise within the purview of the provisions of §§520.30 - 520.42, F. S.

These observations answer the above question in the affirmative, when the transaction is otherwise within the purview of §§520.30 - 520.42, F. S.

061-128—August 8, 1961

CRIMINAL PROCEDURE

CONSTRUCTION OF §901.23, F. S., AS TO WHAT CONSTITUTES UNNECESSARY DELAY

To: *Ed Blackburn, Jr., Sheriff of Hillsborough County, Tampa*

QUESTIONS:

Where a person has been lawfully arrested for a criminal offense without a warrant by the sheriff, his deputy or a police officer:

1. May such sheriff, deputy sheriff or police officer question the accused prior to the appearance of the arrested person before a committing magistrate?

2. After the arrest and prior to the appearance of the arrested person before a committing magistrate, does such sheriff, deputy sheriff or police officer have the right to confer with the state attorney or his assistants in order to determine what charge, if any, should be placed against said accused?

AS TO QUESTION 1:

The answer to question 1 depends upon whether there is an "unnecessary delay" when an officer questions a person whom he has arrested without a warrant prior to taking such person before a committing magistrate. Section 901.23, F. S., reads as follows:

901.23 *Duty of officer after arrest without warrant.*—

An officer who has arrested a person without a warrant, shall *without unnecessary delay* take the person arrested before the nearest or most accessible magistrate in the county in which the arrest occurs, having jurisdiction, and shall make before the magistrate a complaint, which shall set forth the facts showing the offense for which the person was arrested; or, if that magistrate is absent or unable to act, before the nearest or most accessible magistrate in the same county. (Emphasis supplied.)

I find no judicial pronouncement in Florida as to what does or does not constitute an unnecessary delay within the contemplation of said statute.

However, rule 5(a) of the federal rules of criminal procedure contains the following provision which is to the same effect as said §901.23, to-wit:

... any person making an arrest without a warrant shall take the arrested person *without unnecessary delay* before the nearest *available commissioner* or before any other nearby officer empowered to commit persons charged

with offenses against the laws of the United States. When a person arrested without a warrant is brought before a commissioner or other officer, a complaint shall be filed forthwith. (Emphasis supplied.)

and therefore we advert to the decisions of the federal courts as to what constitutes an unnecessary delay under said rule (and under its predecessor federal statute to like effect).

In such cases as *McNabb v. U. S.*, 318 U.S. 332, 87 L.Ed. 819, *Upshaw v. U. S.*, 335 U.S. 410, 93 L.Ed. 100, and *Mallory v. U. S.*, 354 U.S. 449, 1 L.Ed. 2d 1479, where the defendants were arrested, detained for extended periods of time, and subjected to questioning prior to being taken before the U. S. commissioner, the U.S. supreme court held that there was "unnecessary delay." (The shortest period of detention involved in these cases was in *Mallory v. U. S.*, where Mallory was arrested between 2:00 and 2:30 p.m. and taken to police headquarters, where he was questioned from 30 to 45 minutes. Just after 8:00 p.m., he was subjected to a "lie detector" test, during which he was steadily questioned for almost an hour and a half before he finally confessed. It was not until 10:00 p.m., following the confession, that the officers attempted for the first time to reach a U. S. commissioner for the purpose of taking Mallory before such commissioner.) In the *Mallory* case, the U. S. supreme court quoted the above-mentioned rule 5(a) and went on to say:

... The arrested person may, of course, be "booked" by the police. *But he is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements to support the arrest and ultimately his guilt.*

The duty enjoined upon arresting officers to arraign "without unnecessary delay" indicates that the command does not call for mechanical or automatic obedience. Circumstances may justify a brief delay between arrest and arraignment, as for instance, where the *story volunteered* by the accused is susceptible of quick verification through third parties. But the *delay must not be of a nature to give opportunity for the extraction of a confession.* (Emphasis supplied.)

It is apparent that in the *Mallory* case the U. S. supreme court meant to say that any delay beyond a "brief delay" in taking an arrested person before the nearest "available" commissioner or other nearby officer having power to commit persons charged with crimes, is an unnecessary delay. (The said rule 5(a) requires no more than that an arrested person be taken without unnecessary delay before the nearest "available" commissioner or other nearby officer empowered to commit.) I note that in the *Mallory* case the court said that an arrested person is not to be taken to police headquarters "in order to" carry out a process of inquiry that lends itself to eliciting damaging statements to support the arrest and ultimately his guilt. In view of the decisions which will hereinafter be discussed, I interpret that statement to mean that the arrested person is not to be carried to the police station for the purpose of eliciting damaging statements, as distinguished from carrying him there for some such permissible purpose as "booking" him or confining him during a time when no commissioner or other committing officer is available.

I also note that in the *Mallory* case the court said that the

delay must not be of a nature to give opportunity for the "extraction" of a confession. However, I think that the said pronouncements of the U. S. supreme court in the Mallory case should be interpreted in the light of its decision in *U. S. v. Mitchell*, 322 U.S. 65, 88 L.Ed. 1140, and in the light of decisions rendered by U. S. courts of appeal, subsequent to the Mallory decision, in which the Mallory decision was taken into account. So interpreted, I find nothing in the Mallory case to indicate that a brief detention of an arrested person, accompanied by interrogation, amounts to an unnecessary delay; provided the detention is not for the purpose of carrying on a process of inquiry seeking the "extraction" of a confession.

In the *Mitchell* case, which has not been overruled by the U. S. supreme court, it appears that *Mitchell confessed within a few minutes* after he arrived at the police station following his arrest. (The opinion of the U. S. court of appeals in the case which was under review by the U. S. supreme court, viz., *Mitchell v. U. S.*, 138 Fed. 2d 426, said that certain described events transpired "after the appellant (meaning Mitchell) was arrested and brought from his home to the police station and interrogated by the officers, his confession obtained and his consent to the search given." This statement by the U.S. court of appeals can be interpreted only as saying that Mitchell was arrested, taken to the police station and interrogated by the officers before he confessed.) The ruling of the U.S. supreme court was to the effect that there was no unreasonable or unnecessary detention prior to the time Mitchell confessed. It thus appears that in the *Mitchell* case the U. S. supreme court sanctioned a brief interrogation after Mitchell was arrested and carried to the police station.

In *Heideman v. U. S.* (C.A., D.C. circuit), 259 Fed. 2d 943, in which the U. S. court of appeals took note of the previous decision of the U.S. supreme court in the Mallory case, *supra*, it appeared that Heideman and one Brennan were taken into custody at police headquarters at about 3:00 p.m.; that Brennan was first interrogated by Detective Conley but denied all knowledge of the crime under investigation; that Conley then informed Brennan of what he had learned from his investigation, whereupon Brennan made incriminating admissions; that Heideman was then questioned by Conley but denied knowing anything about the crime; that Brennan was called in to repeat what he had told Conley but Heideman still denied guilt and maintained that he knew nothing about the crime; that Conley then commenced to type up papers for the arraignment of Heideman and Brennan before the U. S. commissioner and had almost completed the papers on Heideman when he asked Heideman whether the latter wished to make any further statement, at which point Heideman confessed to the crime; that between 10 and 20 minutes elapsed between the commencement of Heideman's interrogation and his confession, and that his confession was made not less than 30 nor more than 45 minutes after his arrest at police headquarters; and that Heideman was then booked, photographed, fingerprinted and taken to the U. S. commissioner's office, arriving there at about 4:10 or 4:15 p.m. Despite the fact that Heideman was thus detained and interrogated at police headquarters, and his confession obtained, before he was carried before a commissioner, the U. S. court of appeals held that there was no unnecessary delay in taking him before said commissioner. The said court said that the delay in the Heideman case was plainly dis-

tinguishable from the delay in the Mallory case, *supra*, and also said:

At the outset, the police, assuming they have probable cause for arrest, are entitled to ask the arrested suspect what he knows about a crime. If he denies knowledge, they are entitled to state to him what evidence they have and ask whether he cares to comment upon it. A strong circumstantial case which would satisfy the U.S. commissioner, *prima facie*, might well be explained away by a suspect who knew what information the police relied on—hence leading to no charge being made. If the suspect continues to deny knowledge, the police are entitled to conclude the interview by saying, in effect, "Do you have anything further to tell us, or do you just want to let it stand the way it is?" which was what Detective Conley asked appellant. Such questions as these the police may ask—indeed *should* ask; . . ." (Emphasis supplied.)

The U. S. supreme court was given an opportunity to overrule the court of appeals if it thought that the latter court's ruling in the Heideman case was inconsistent with the U. S. supreme court's pronouncements in the Mallory case, but it declined the opportunity by denying Heideman's petition for certiorari (3 L.Ed.2d 767).

In *Goldsmith v. U. S.* (C.A., D.C. Circuit), 277 Fed. 2d 335, the U. S. court of appeals took note of the decision of the U. S. supreme court in the Mallory case, *supra*, in its discussion of what constitutes an unnecessary delay in taking an arrested person before a U. S. commissioner and, among other things, said:

. . . We must not forget that interrogation is not an evil *per se* but an absolute necessity and that it often leads to releases, not charges.

In *Metoyer v. U. S.* (C.A., D.C. circuit), 250 Fed. 2d 30, the U. S. court of appeals stated that Metoyer relied on the decision of the U. S. supreme court in the Mallory case and on rule 5 of the federal rules of criminal procedure and, among other things, said:

If police are compelled to arraign all potential suspects before questioning any of them we shall have used the artificial niceties and superficial technicalities concerning our liberties to reduce genuine and important rights to absurdity—and dangerous absurdity at that. Every citizen has a right to insist that the police make some pertinent and definitive inquiry *before* he may be arraigned on a criminal charge, which even if it is later abandoned inflicts on him a serious stigma. (Emphasis supplied.)

Taking into consideration the above-cited cases, and the fact that the federal courts were dealing with a rule of procedural law to the same effect as §901.23, F. S., my conclusion is that there is no unnecessary delay within the contemplation of said Florida statute when, after making an arrest without a warrant, the arresting officer questions the arrested person for a *brief* period of time prior to carrying him before a magistrate (even when a magistrate is available), and that, subject to the foregoing comments, question 1 is answered in the affirmative.

Before leaving question 1, I wish to point out that there is no unnecessary delay in any instance so long as a magistrate is not available. A magistrate is usually not considered to be avail-

able except during his ordinary professional hours. The law does not require a magistrate to work at his job 24 hours a day, seven days a week. (See *Pierce v. U. S.*, 197 Fed. 2d 189; *Porter v. U. S.*, 258 Fed. 2d 685; *Lockley v. U. S.*, 270 Fed. 2d 915; and *Williams v. U. S.*, 273 Fed. 2d 781). The ordinary professional hours of many, if not all, magistrates do not include nights, Sundays or holidays. So long as there is no available magistrate, an arrested person may properly be held until a magistrate is available.

In passing, I note that although, solely as a matter of federal practice, the federal courts exclude from evidence confessions made during a period of unnecessary delay in taking an arrested person before a magistrate, the U. S. supreme court holds that state courts are not obliged to do likewise, and the supreme court of Florida has refused to apply such a rule of exclusion (*Finley v. State*, 14 So. 2d 844; *Singer v. State*, 109 So. 2d 7; *William Earl Leach, et al. v. State*, decided June 16, 1961, not yet reported). While this is the present differentiating rule, there is always the prospect that even in state prosecutions, the federal courts, when petitioned to review them, may eventually hold that unnecessary delays of the kind here under consideration are fundamental denials of the essential requirement of due process, so care should be taken not to unduly extend the time or permit the process of inquiry to unduly stray beyond the limits of the federal rule.

AS TO QUESTION 2:

When an arrest is made without a warrant, and when the arresting officer is in doubt as to what charge, if any, should be placed against the arrested person upon the basis of the facts known to such arresting officer, I think that it is proper for the arresting officer to confer with the appropriate public prosecutor, if he is readily available, or with any of his assistants who are readily available, prior to carrying the arrested person before a magistrate. Delays for such consultations are not to be employed as a cloak to cover an undue extension of the time of questioning the prisoner prior to commitment.

Any delay for the purpose of conferring with a prosecuting attorney which could not be considered a brief one under the circumstances would, in my opinion, be an unnecessary delay within the contemplation of the Mallory case and of our §901.23. My opinion is that question 2 is properly answered in the affirmative, provided that the delay occasioned by the conference is a brief one.

061-129—August 11, 1961

LICENSE TAXES

CERTAIN EXEMPTIONS FROM STATE, COUNTY OR MUNICIPAL LICENSE TAXES—FARM, GROVE, HORTICULTURAL AND FLORICULTURAL PRODUCTS—§205.17, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Are farm and grove products exempt from license requirements under §205.17, F. S., when offered for sale by an agent or employee of the farmer or grower producing such agricultural products?

The term "employee," according to Black's law dictionary, is synonymous with the word "servant." "Servant" is defined, by the

same source, as a "person in the employ of another and subject to his control as to what work shall be done and the means by which it shall be accomplished." A master-servant relationship is a type of agency; and the word agency, according to Black, "includes every relation in which one person acts for or represents another by the latter's authority." An agent is defined as "one who acts for or in place of another by authority from him."

Section 205.17, F. S., states in part:

All farm and grove products and products manufactured therefrom . . . shall be exempt from all forms of license tax, state, county and municipal when the same is *being offered for sale or sold by the farmer or grower producing the said products* . . . (Emphasis supplied.)

Obviously, "farmers or growers" in any sizable farm or grove operation must hire and use employees. The legislature, in exempting products being offered for sale by the "farmer or grower producing said products" certainly did not intend to limit the exemption to farmers or growers who do not employ others. Similarly, it is doubtful that the legislature intended to be so technical as to exclude from the exempting purview of §205.17, the sale of products by an agent or employee of the producer when such person, under the direction of his employer, and as an incident of his employment, takes commodities to town for the purpose of sale. It is our position that the term "farmer or grower" as used in §205.17 is broad enough to include such an agent or employee of the farmer or grower.

In using the words "agent or employee" in the preceding paragraph, we do not intend to include vegetable or produce brokers who sell on commission or otherwise for more than one farmer or grower. By "broker" we mean an agent employed to make bargains and contracts for a compensation; a person whose business it is to bring buyer and seller together. A broker is a middleman or negotiator between parties (Black's law dictionary). True, a broker is an agent, but he is a special type of agent, procured by the principal for a limited purpose. If a farm or grove worker is sent by his employer to town to sell their produce as an incidental part of his main employment as a grove or farm worker, he would clearly fall within the exemption provided for in §205.17. In such case, he would be under the control of his employer. On the other hand, a broker representing more than one employer and who is not controlled to any great degree by any one of them in particular would not seem to be exempt under said section. Whether or not the vendor of produce is or is not exempt appears to be a factual question which should be decided by applying the above legal rules only after a thorough examination of the circumstances surrounding each individual claim for exemption under §205.17, F. S.

In AGO 059-94, May 19, 1959, we said that milk vending machines, operated by dairymen to vend milk produced by them on their dairy farms in this state, are entitled to the exemption from licenses and license taxes provided by §205.17, F. S. Section 205.17 should not be so strictly construed as to confine its application to the grower or farmer personally; rather, that section is broad enough to include not only the grower but also the instrumentalities or media used by him in selling his products directly to the public, such as vending machines and employees under his exclusive control.

Your question is answered accordingly.

061-130—August 11, 1961

**INTERSTATE PAROLE AND PROBATION COMPACT
ARREST AND DETENTION OF PAROLEE OR PROBATIONER
FROM FOREIGN STATE BY FLORIDA SHERIFF—§§941.13,
949.07-949.09, F. S.**

To: Dale Carson, Sheriff of Duval County, Jacksonville

QUESTIONS:

1. Where a person has been convicted in another state and paroled or placed on probation there, and permitted to come to Florida under the terms of the interstate parole and probation compact, and thereafter the out-of-state parole and probation agency desires to have him picked up in Florida as an alleged parole or probation violator, and said agency issues its warrant for his arrest, does the Florida sheriff have the authority to execute such warrant, arrest the alleged violator and hold him for the out-of-state agency?

2. If the Florida sheriff has that authority, should he obtain a fugitive warrant based upon the out-of-state warrant under the provisions of §941.13, F. S., and thereafter, should the alleged violator be held or released on bond to await the arrival of extradition papers?

Sections 949.07-949.09, F. S., adopted the uniform law for out-of-state probation and parole supervision and authorized and directed the governor to enter into a compact on behalf of this state with any state of the U.S. legally joining therein in the form set out in said uniform law, which law defines "state" as also including Puerto Rico, the Virgin Islands and the District of Columbia. All fifty states, Puerto Rico and the Virgin Islands have adopted similar legislation and joined in said compact.

Said compact authorizes the duly constituted judicial and administrative authorities of a state which is a party to the compact (called "sending state") to permit any person convicted of an offense within such state, and placed on probation or released on parole, to reside in any other state which is a party to the compact (called "receiving state") while on probation or parole, under conditions therein specified. Pertinent provisions of said compact read as follows:

(2) That each receiving state will assume the duties of visitation of and supervision over probationers or parolees of any sending state and in the exercise of those duties will be governed by the same standards that prevail for its own probationers and parolees.

(3) That duly accredited officers of a sending state may at all times enter a receiving state and there apprehend and retake any person on probation or parole. For that purpose no formalities will be required other than establishing the authority of the officer and the identity of the person to be retaken. All legal requirements to obtain extradition of fugitives from justice are hereby expressly waived on the part of states party hereto, as to such persons. The decision of the sending state to retake a person on probation or parole shall be conclusive upon and not reviewable within the receiving state; provided however, that if at the time when a state seeks to retake a

probationer or parolee there should be pending against him within the receiving state any criminal charge, or he should be suspected of having committed within such state a criminal offense, he shall not be retaken without the consent of the receiving state until discharged from prosecution or from imprisonment for such offense.

(4) That the duly accredited officers of the sending state will be permitted to transport prisoners being retaken through any and all states parties to this compact, without interference.

(5) That the governor of each state may designate an officer who, acting jointly with like officers of other contracting states, if and when appointed, shall promulgate such rules and regulations as may be deemed necessary more effectively to carry out the terms of this compact.

I find nothing in the compact which says anything about an officer of the receiving state arresting and detaining a parolee or probationer, or detaining one who is already in custody, for delivery to the authorities of the sending state. Nor is there anything in the compact which in terms authorizes the compact administrator of a receiving state to issue a warrant for a parolee or probationer whose return is desired by the sending state.

Nevertheless, it appears that in *Stone v. Robinson*, Sheriff, (Miss., 1954), 69 So. 2d 206, the supreme court of Mississippi approved the detention of a Louisiana parolee by a Mississippi sheriff under an arrest warrant issued by the Mississippi compact administrator. Being dissatisfied with his detention, the parolee, Stone, filed a petition for writ of habeas corpus, which was dismissed by the trial court, and upon appeal to the supreme court of Mississippi he contended, among other things, "... that the warrant issued by John A. Payne as administrator of the interstate compact for parolees and probationers for the state of Mississippi for the arrest and detention of the appellant pending his surrender to the Louisiana authorities was not authorized by law." The Mississippi supreme court rejected this contention upon the ground that the Mississippi compact administrator had "sufficient cause to justify him in issuing the warrant ... under the broad provisions of the said Ch. 436 of the Mississippi laws of 1948, *supra* (the law authorizing Mississippi to enter into the compact) and under the decisions of the courts of Arkansas, California, Ohio and New York in their interpretation of the uniform act for out of state parolee supervision." (parenthetical matter and emphasis supplied.) We quote from the Mississippi court's opinion as follows:

The remaining assignments of error by the appellant deal with the question of the admissibility in evidence of the original of the certificate of parole, the warrant issued by the commissioner of public welfare of Louisiana and directed to the director of probation and parole of that state for the arrest of the appellant, and on the ground that the same were not certified to under the act of congress as alleged to be provided for by §1747 Mississippi code of 1942 and the amendments thereto, and on the further ground that the warrant issued by John A. Payne as administrator of the interstate compact for parolees and probationers for the state of Mississippi for the arrest and detention of the appellant pending his surrender to the Louisiana authorities was not authorized by law.

But we are of the opinion that since the witness Payne testified that he personally knew that the signer of the Louisiana warrant was the commissioner of public welfare of that state and that the person to whom it was directed was the director of probation and parole of that state, these documents were admissible in evidence since the witness Hagg, a state probation and parole officer of Louisiana, testified and attested to the genuineness of their signatures at the habeas corpus hearing; and that *these documents together with a written communication received by Miss Evelyn Gandy, director of legal service of the Mississippi department of public welfare and also deputy administrator of the interstate parole compact, from the officer of Louisiana to whom the warrant in that state was directed, afforded to the said John A. Payne, as chairman of the Mississippi state parole board and administrator of the interstate compact for parolees and probationers for the state of Mississippi, sufficient cause to justify him in issuing the warrant for the detention of the appellant pending his being retaken by the Louisiana authorities, under the broad provisions of the said chapter 436 of the Mississippi laws of 1948, supra, (the law authorizing Mississippi to enter into the compact) and under the decisions of the courts of Arkansas, California, Ohio and New York in their interpretation of the uniform act for out of state parolee supervision.* (Parenthetical matter and emphasis supplied.)

And in 1959 the supreme court of Alabama, in the case of *State of Alabama ex rel Bridges, Sheriff of Mobile County v. Waters*, 108 So. 2d 146, held that after the sending state had revoked Waters' parole, his arrest and detention by Alabama officers was lawful. Waters was a parolee from Texas under the provisions of the said compact. Texas revoked his parole and he was accordingly arrested in Alabama by city of Mobile police and turned over to the sheriff of Mobile County, Alabama, for delivery to the proper Texas authorities for return to Texas. In a habeas corpus proceeding, the circuit court of Mobile county ordered Waters discharged from the sheriff's custody. An appeal was taken by the state of Alabama from this order. On appeal, Waters contended that his arrest and detention were illegal because the apprehending officers in Alabama were not "duly accredited officers of the sending state." The Alabama supreme court cited its previous decision in *Woods v. State*, 87 So. 2d 633, and then proceeded to reject Waters' said contention and to reverse the circuit court's order in his favor, by saying:

Appellee also argues that all of the four requirements in the *Woods* case are not met. The opinion in that case states:

"The questions on habeas corpus when the statute in question is relied on are: (1) a compact between the governors as authorized by the statute; (2) whether the officer apprehending the person involved is a duly accredited officer of the sending state (New York here); (3) whether the person apprehended is in fact a probationer or parolee of that state; and (4) whether the sending state has revoked the probation or parole of the person apprehended and decided to retake him."

Appellee contends that the officer apprehending the person involved is not a duly accredited officer of the sending state, here Texas. Admittedly, appellee was arrested by city of Mobile police and turned over to the sheriff of Mobile county to be delivered to the duly accredited officer of Texas. We do not construe the Woods case to hold that the person involved must be apprehended by an officer of the sending state. The statement means that such apprehension by a duly accredited out of state officer is permissible. The opinion quotes that part of Tit. 42, §27, which provides that "duly accredited officers of a sending state may at all times enter a receiving state and there apprehend and retake any person on probation or parole." The statement numbered (2) in the Woods case applies when the apprehension is by the duly accredited officer of the sending state and does not mean that he must be the apprehending officer.

The judgment of the circuit court is reversed and the cause is remanded in order that the circuit court may order the appellant to be placed in the custody of the sheriff of Mobile county and the petition for writ of habeas corpus may be denied. (Emphasis supplied.)

I construe the said Waters case as clearly holding that not only may the duly accredited officers of a sending state come into a receiving state and take a parolee into custody, but also that, when the proper authorities of a sending state elect to have a parolee returned to that state, the officers of the receiving state may arrest the parolee and hold him for delivery to the duly accredited officers of the sending state. And I think that this principle is applicable without regard to whether or not the sending state has revoked the parole, since the compact does not require a revocation as a condition precedent to retaking the parolee from the receiving state. (It is to be noted that the Alabama court's opinion in the Waters case makes no mention of the issuance of a warrant of any kind in either Texas or Alabama.)

Further, the supreme courts of several other states and one U. S. court of appeals have rendered decisions involving the compact which, although not expressly ruling on the question of whether officers of a receiving state have the right to arrest and/or detain a parolee for surrender to officers of a sending state, could not have reached the conclusions which they did reach without taking it for granted that officers of a receiving state have that right. We will now briefly discuss these cases.

Gulley, Sheriff, v. Apple (Ark., 1948), 210 S.W. 2d 514. Apple was paroled in Missouri and permitted to go to Arkansas. Thereafter, the Missouri board of probation and parole revoked Apple's parole and directed his arrest and return to the Missouri penitentiary. He was then arrested by an Arkansas parole officer and lodged in the Pulaski county jail. Apple instituted a habeas corpus proceeding in the circuit court. The sheriff justified his detention of Apple solely under the authority of the compact, which had been entered into by both Missouri and Arkansas, and under the Arkansas law which authorized the compact. The circuit court ordered Apple discharged and the sheriff, who had him in custody, took an appeal. In reversing the decision of the circuit court in favor of the appellee Apple, the supreme court of Arkansas remanded the cause to the circuit court "with directions to dismiss the peti-

tion of appellee and remand him to the custody of the sheriff of Pulaski county who will deliver appellee to the authorized agent of the state of Missouri for return to that state." (I find nothing in the court's opinion to indicate that either Missouri or Arkansas had issued a warrant for Apple's arrest.)

Ex parte Tenner (Cal., 1942), 128 Pac. 2d 338. Tenner was paroled in Washington and permitted to go to California. Later, the Washington board of prison terms and paroles revoked the parole and ordered that Tenner be returned to the Washington penitentiary. (The opinion of the California court does not say who arrested Tenner but it does say that he was arrested "upon the order" of the Washington board and that he was held by the respondent chief of police "pursuant to the direction" of the Washington board as a convict whose parole had been revoked.) The said opinion makes no mention of a warrant having been issued in either Washington or California.) After his arrest, Tenner applied to the supreme court of California for a writ of habeas corpus, which court issued the same. That court concluded its opinion by saying: "... the writ is discharged and the petitioner is remanded to the custody of the respondent chief of police."

People ex rel Rankin v. Ruthazer (New York, 1950), 98 N.Y.S. 2d 104, affirmed by the New York court of appeals in People ex rel Rankin v. Ruthazer, 107 N.E. 2d 458. It appears from the opinions in these two cases that the Michigan parole board granted Rankin a parole under the terms of which he was permitted to reside in New York. Later, the Michigan board issued a warrant for Rankin's arrest as a parole violator. (The affirming opinion of the court of appeals speaks of the warrant as "... a warrant demanding that he be arrested in New York and returned to Michigan ...") Rankin was arrested in New York under said warrant and was detained by the respondent Ruthazer, who was the warden of the city prison of the borough of Manhattan, city of New York. Rankin applied to a New York court for a writ of habeas corpus which court ruled against him and concluded its opinion by saying: "Relator is remanded for surrender to the officer of the state of Michigan." As pointed out above, the court of appeals affirmed on appeal.

United States ex rel Simmons on Behalf of Delores Gray v. Lohman and Blazek (C.A. 7th, 1955), 228 Fed. 2d 824. Delores Gray received a parole in Michigan and was permitted to go to Chicago to reside. Thereafter, a Michigan parole violation warrant was issued. She had finished serving an Illinois sentence but was thereafter retained in custody by Illinois sheriff Lohman and warden Blazek to await the arrival of Michigan officers. The sole justification for such detention was a parole violation warrant issued in Michigan and a request that she be returned to that state under the compact. She obtained a writ of habeas corpus from a U.S. district court. That court discharged the writ and "... remanded the petitioner to the custody of respondents, to be delivered to an officer or agent of the state of Michigan." On appeal, the U.S. court of appeals affirmed the district court's judgment. (Along the same general lines, see State ex rel Nagy v. Alvis (Ohio, 1950), 90 N.E. 2d 582.)

While it is true that none of the above-cited decisions except the ones rendered by the Mississippi and Alabama supreme courts specifically dealt with the point here under discussion, it is glaringly apparent that the courts which rendered the other decisions

could not have made the orders which they did make except upon the assumption that under the compact the officers of a receiving state have the right to arrest and/or detain parolees for surrender to officers of a sending state. And the above-cited decisions in Alabama and Mississippi fully support the soundness of that assumption.

Here, let me say that a probationer is just as subject to arrest by officers of the receiving state as is a parolee, both being covered by the compact.

In the light of the foregoing court decisions, I think that question 1 is properly answered in the affirmative. However, in an abundance of caution, I suggest that a warrant also be issued by the Florida compact administrator, as was done in the Mississippi case of *Stone v. Robinson*, supra; that the said administrator attach to his warrant of arrest a certified copy of the order of probation or certificate or order of parole, as the case may be, and the warrant from the sending state and transmit all three instruments to the proper Florida sheriff; and that the arresting Florida sheriff arrest the parolee or probationer under both warrants.

I have discussed this matter with the Florida compact administrator, Honorable Francis R. Bridges, Jr., currently the chairman of the Florida parole commission, and he has indicated his willingness to issue warrants, as compact administrator, pursuant to the above suggested procedure. Mr. Bridges advises that no unnecessary delay will be caused by so doing, since the practice is for sending states to handle through the Florida parole commission matters connected with the retaking of parolees and probationers whose return to the sending states is desired by the proper authorities of those states.

I am cognizant of the fact that a 1947 opinion of my predecessor in office (AGO 047-371, attorney general's 1947-1948 biennial report, pp. 610-611) which, incidentally, was prepared by the Hon. Reeves Bowen, assistant attorney general, expressed the view that the compact appears to contemplate that it is up to the sending state to do its own arresting of its parolees and probationers whom it wishes returned from a receiving state. However, the subsequently rendered court decisions cited above have forced a re-appraisal and have led to a conclusion contrary to the views expressed in said opinion 047-371.

AS TO QUESTION 2:

The issuance of a fugitive warrant pursuant to §941.13, F. S. (a part of the uniform extradition law) is merely a step towards extradition and is for the purpose of taking a fugitive into custody and holding him, or requiring him to post bail, so that he will be available for arrest under an extradition rendition warrant subsequently issued by the governor. The compact dispenses with the need for any step towards extradition whatever. Moreover, there is no necessity for the issuance of a fugitive warrant for a person already lawfully held pursuant to the procedures approved in my discussion of question 1. A parolee or probationer held pursuant to said procedures, as distinguished from being held under a fugitive warrant, is not entitled to bail.

Therefore, question 2 is answered in the negative.

061-131—August 16, 1961

COUNTY SCHOOL SYSTEM

BOARD OF PUBLIC INSTRUCTION—AUTHORITY UNDER §45.20, F. S., TO RECOVER DAMAGES FOR THEFT OF SCHOOL EQUIPMENT BY MINORS

To: Thomas D. Bailey, State Superintendent of Public Instruction,
Tallahassee

QUESTION:

May a board of public instruction recover damages from a parent under §45.20, F. S., for a loss occasioned when minors break into a school and steal school equipment, rather than destroy the equipment, and the board of public instruction is unable to recover the property, thereby suffering a complete loss?

Section 45.20, F. S., provides:

Civil action against parents; wilful destruction of property by minor.—

(1) Any municipal corporation, county, school district and department of Florida or any person, partnership, corporation or association, or any religious organization whether incorporated or unincorporated, shall be entitled to recover damages in an appropriate action at law in an amount not to exceed \$300 in a court of competent jurisdiction from the parents of any minor under age of 18 years, living with the parents, *who shall maliciously or wilfully destroy property, real, personal or mixed, belonging to such municipal corporation, county, school district, or department of the state, or person, partnership, corporation or association, or religious organization.*" (Emphasis supplied.)

The common law rule applicable to the liability of a parent for his child's torts is set forth in 39 Am. Jur., p. 690, as follows:

It is universally held at common law that the mere fact of paternity does not make a parent liable for the torts of his minor child. A fortiori is this true in the case of an adult child. The parent is not liable merely because the child lives at home with him, works for him, and is under his care, management, and control. Rather, liability exists, apart from the parent's own negligence, only where the tortious act is done by the child as the servant or agent of the parent, or where the act is consented to or ratified by the parent. The rule that the parent is not liable holds true whether he is present or absent when the tort of the child is committed. However, a parent may be liable for an act of his child if his conduct in the premises was such as to render him a principal tort-feasor, or, in other words, if his own negligence was a proximate cause of the injury complained of. Such negligence is shown, for example, where the parent intrusts a dangerous instrumentality to the child, or carelessly fails to restrain a child whom he knows has dangerous tendencies. In a case of this kind, the parent's liability is based upon the ordinary rules of negligence, not upon the relation of parent and child. So, where the injury occurs while the child is driving the parent's automobile, any liability there may be upon the

parent, apart from statute or the special "family purpose" doctrine, must be predicated upon the rules of agency and negligence, and cannot be based upon the mere fact of paternity. It is held that the relationship of parent and child is no evidence of a conspiracy to do the tortious act complained of.

In some jurisdictions, notably Louisiana, the liability of a parent for the torts of his child has been the subject of statutory enactments, based on the civil law, making the parent liable for all torts committed by his minor children. (Emphasis supplied.)

See also 44 A. L. R. 1514:

It is provided in the Louisiana code, Art. 2318, that "the father, or after his decease, the mother, are responsible for the damage occasioned by their minor or unemancipated children residing with them or placed by them under the care of other persons. . . ."

Under the Louisiana statute, the defendant was held liable for the intentional or careless act of his son 13 years of age in shooting another boy in the streets of a city. *Marionneaux v. Brugier* (1883) 35 La. Ann. 13.

Section 45.20, F. S., is not a penal statute subject to the strict construction generally applied to such acts. It is on the contrary an act which establishes a civil remedy in tort over and beyond the liability normally imposed by the common law as applied in most jurisdictions today. Even if it were a penal act, however, we believe that the controlling factor in its application is the legislative intent. 50 Am. Jur. 436:

The rule that the primary object in the construction of a statute is to ascertain the legislative intent, to be gathered from the language used, is as applicable to penal statutes, as it is to statutes generally. Such statutes, like all other statutes, should be so interpreted as to be in harmony with, preserve, and effectuate the manifest intent of the legislature, and an interpretation should be avoided which would operate to defeat the manifest intent of the legislature.

In view of the above, it is my opinion that the legislature intended to fix financial responsibility on the parents (not to exceed \$300 and court costs) for the malicious or wrongful acts of their children under 18 years of age. I do not believe it was the intention of the legislature to limit the application of §45.20, F. S., to acts where property was simply destroyed or damaged on the school premises. We believe rather that the act has equal application to situations such as described in your question where property is *removed or stolen beyond recovery from the control of school authorities*. It would appear to be a strained construction of the act indeed to attempt to relieve the parent of financial responsibility for the wilful destruction of property by his child simply because the property had been removed to another location. Perhaps the act should be amended to be more specific and inclusive in its language to better define "destroyed property."

In the meantime, however, or unless a court of competent jurisdiction rules that the act is limited in its application to property "maliciously or wilfully destroyed" on the premises as contrasted to stolen property which cannot be recovered, we believe that the more logical and reasonable construction of the act in attempting to

comply with the intent of the legislature is to take the view that the act applies regardless of whether the property in question is destroyed on the school premises or carried away to some undisclosed place beyond the reach of authority.

Your question is therefore answered in the affirmative.

061-132—August 24, 1961

**PUBLIC OFFICIALS—CONFLICT OF INTEREST IN
BUSINESS TRANSACTIONS**

**GOVERNING BOARD OF MOSQUITO CONTROL DISTRICT
PROHIBITED FROM DOING BUSINESS WITH BANK OR
CORPORATION WHERE MEMBER OF BOARD IS OF-
FICER OR STOCKHOLDER OF SAID BANK OR
CORPORATION**

*To: William Dryden, Secretary-Treasurer, Lee County Mosquito
Control District, Fort Myers*

QUESTION:

Where a stockholder or officer of a banking institution or business corporation doing business in this state becomes a member of the governing board of a mosquito control or other public district, may the said district transact business with such bank or corporation?

This question is the effect of a public officer's relation to corporations, as a stockholder or officer, as constituting interest within the statute or rule of common law against a public officer being interested in a contract with the public. In connection with an annotation, upon the question of a public officer's relation to a corporation as an officer or stockholder as constituting interest within statutes, or the rule of common law, against a public officer being interested in a contract with the public, in 140 A.L.R. 344-361, the annotator concludes that the general rule is that the interest of a public officer as a stockholder in a corporation entering into a contractual relation with the public is a prohibited interest in the transaction within the common-law principle against such an interest based on public policy, and statutes declaratory of the common law. That a stronger case of interest exists where public officers are not only stockholders but also officers of the corporations with which the public has attempted to enter into a contract. To the same effect see also 43 Am. Jur. 107-108, §300, and 67 C.J.S. 406-407, §116.

This rule appears to have been followed by the courts of this state (*Lainhart v. Burr*, 49 Fla. 315, 38 So. 711, text 714; *Stubbs v. Florida State Finance Co.*, 118 Fla. 450, 159 So. 527, text 528; *State Board of Adminis. v. Pasco County*, 156 Fla. 27, 22 So. 2d 387; *City of Stuart v. Green*, 156 Fla. 551, 23 So. 2d 831, text 834; *City of Miami v. Benson*, Fla., 63 So. 2d 916, text 920; *Fruchtl v. Foley*, Fla., 84 So. 2d 906, text 908; *Watson v. City of New Smyrna Beach*, Fla., 85 So. 2d 548, text 549; and *State v. Hooten*, Fla. App., 122 So. 2d 336, text 340).

From the above and foregoing it appears that the validity of a contract between a public officer and a bank, of which the said officer is either a stockholder or an officer, is of questionable validity in this state, because of the bank interest represented by its stockholder or officer who is also the contracting public officer. A stronger case against the validity of the contract seems to arise

where the contracting officer is also both a stockholder and an officer of the bank in question. This same rule appears to have been generally applied where the stockholder or officer is a member of a contracting board or agency instead of the lone contracting officer.

These observations lead to a negative answer to the above question, where the transaction between the bank and the officer or board member who is also a stockholder or officer of the said bank.

We now come to the specific question of whether or not one enters into a contract with a bank when he opens a checking account, obtains a loan from the bank, purchases a certificate of deposit, or obtains from the bank any other banking services. In *McCrary Stores Corp. v. Tunncliffe*, 104 Fla. 683, 140 So. 807, text 807, the court defines a bank deposit as being a banking transaction as denoting "a contractual relation between one who delivers money or a thing to a bank which receives it with the implied agreement on the part of the bank that the deposit will be paid out on the order of the depositor or returned to him upon demand." There can be no doubt but that a bank loan results from a contract between the bank and the person receiving the loan. A certificate of deposit has been said to be an acknowledgement by a bank of the receipt of money on deposit and a promise to repay the same as stipulated in such certificate or otherwise. Other banking service may or may not constitute contracts depending upon the facts and circumstances involved in each particular case and the law of contracts.

The above stated question is answered accordingly.

061-133—August 29, 1961

REGULATION OF MOTOR FUEL DISTRIBUTORS AND DEALERS

MOTOR FUEL TAXES—REPORTS—PENALTIES UNDER §§207.08, 208.06, 208.07 AND 208.44, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. When a report is received in this office and postmarked after the 25th day of the month succeeding the month for which the report is filed, is tax due subject to a penalty of 10%, and if so, is a five-day notice required to be given?

2. When a check in payment of the tax is returned unpaid by the bank, should the 10% penalty be assessed, and if so, is a five-day notice required to be given?

3. When a report is filed and the tax paid within the time provided by §208.06, and an error is made reducing the tax, or a tax free deduction of gasoline is made which the department will not allow, is the tax due subject to the 10% penalty, and if so, is a five-day notice required to be given?

4. When the accounts of a bonded distributor are audited and it is discovered that taxable gallons of gasoline have not been reported as provided by §208.06, should the 10% penalty be assessed, and if so, is a five-day notice required to be given?

Under §207.08, F. S., "whenever any distributor shall (1)

neglect or refuse to make and file any report for any calendar month as required by the motor fuel tax laws of this state, (2) or shall file an incorrect or fraudulent report, (3) or shall be in default in the payment of any motor fuel taxes and penalties thereon payable under the laws of this state, the comptroller, after giving at least five days' notice to such distributor, shall, from any information he may be able to obtain from his office or elsewhere, estimate the number of gallons of motor fuel, with respect to which the distributor has become liable for taxes under the motor fuel laws of this state, and the amount of taxes due and payable thereon, *to which sum shall be added a sum equal to 10% thereof, as a penalty for the failure of such distributor or his default aforesaid.*"

Sections 208.07 and 208.44, F. S., provide a penalty of 10% of the taxes due where the distributor fails to make a report of his sales, or pay the taxes due for the previous month, *on or before the 25th of the current month.* In substance said §§207.08, 208.07, and 208.44, provide a 10% penalty against (1) motor fuel dealers who neglect or fail to file the said report by the said 25th, (2) a like penalty upon dealers who file incorrect or fraudulent reports, and (3) a like penalty upon dealers who fail to pay over the taxes due on or before the said 25th.

A distributor who fails to prepare and file his report, as required by said §§207.08, 208.07 and 208.44, F. S., and pay the taxes due upon the motor fuels sold, on or before the 25th of the month following the time of sale, violates the requirements of said sections, and subjects himself to the penalties imposed by said sections. Where such a report, as well as the payment due, is not mailed by the distributor, or delivered to the state comptroller, or his duly authorized agent, and such report or payment is not made on or before the 25th of the following month as is required by said sections, the distributor should be deemed as being in default, unless prevented by an act of God or the public enemy, and subject to the provisions of said sections.

Our supreme court in *Cowen v. Indianapolis Life Ins. Co.*, 116 Fla. 814, 157 So. 180, text 182, held that, in the absence of an agreement to the contrary, the acceptance by a creditor of a check, whether it be a cashier's check, certified check, or the debtor's check, or the check of a third person, will not constitute a payment of the obligation, until the said check is paid by the bank upon which drawn. See also 24 Fla. Jur. 531-535, §§9-15, to the same effect. To the same effect, as to payment of taxes by check, see annotations in 44 A.L.R. 1234-1237, and 124 A.L.R. 1155-1163. Where a check given in payment of motor fuel taxes is returned for insufficient funds, there is a default in the payment of the said tax if not corrected on or before the 25th of the month subsequent to sale.

Where the report and payment of the tax, made within the time required, is in error and omits to include certain taxable motor fuels, there has been an incomplete return of the sales so that there has been an omission to make a report as to the omitted portion, omitted due to the error or omission. Where the omission is due to an error of the distributor, and not due to an intention to file an incorrect or fraudulent report, we feel that there has been a failure to make and file a report as to the said error and omission, and to pay the tax thereon; the report should be deemed sufficient as to the remainder of the said report, provided payment of the tax on the sales reported is made within the required time.

Where, upon audit of the accounts of the distributor, uninten-

tional omissions from the reports made of taxable motor fuels over a period of time are revealed, and such omissions do not appear to be an intention to file incorrect or fraudulent reports, we feel that there has been a failure to make and file a report as to the errors and omissions, and to pay the tax thereon. However, where the report mentioned in this paragraph, as well as the one mentioned in the previous paragraph, appears to have been intentionally incorrect or fraudulent, then such errors and omissions would seem to result in an incorrect or fraudulent report within the purview of said sections of the statutes.

Although both §§208.07 and 208.44, F. S., provide that upon failure of a distributor to conform to those sections, that the comptroller determine the tax due and impose a 10% penalty, and proceed to collect the tax due, §207.08, makes a further requirement that the unpaid tax and penalty be imposed "after giving at least five days' notice to such distributor." Doubtless the giving of this notice was intended by the legislature to serve some purpose, such as providing a time within which the taxpayer may demonstrate to the comptroller the correctness of the report made by him, or that no report and taxes were due. Although this notice is not mentioned in §§208.07 and 208.44, we feel that §207.08, supplements said two sections and is applicable.

These observations, statutes and authorities answer the four above stated questions in the affirmative; subject, however, to the above limitations as to questions 3 and 4, applying them only to the omissions from the reports regularly made.

061-135—August 30, 1961

MERIT SYSTEM COUNCIL

REVIEW OF DECISIONS BY STATE PERSONNEL BOARD— RULES AND REGULATIONS—PARTIES—§110.09, F. S.

To: Gerald L. Howell, Merit System Director, Tallahassee

QUESTION:

Under the rules promulgated by the state personnel board and the applicable statutory provisions, does an agency have the right to appeal a decision of the merit system council to the state personnel board in cases involving discharged employees?

The power of one administrative agency to review a determination by another, the right to have such a review, and the proceedings for such review depend upon statute and administrative rules applicable in the particular instance. (1 Fla. Jur., Administrative Law, §§156 and 158, pp. 372 and 373 respectively).

It should be stated at the outset that a "right of appeal" as such, does not exist either under the statute or applicable rules adopted by the personnel board. Section 110.09, F. S., merely provides a method of "review" resting solely in the discretion of the state personnel board. In other words, whether the moving party is the agency or the discharged employee there would be no right, per se, to have a merit system council decision reviewed; but rather it would be left to the discretion of the state personnel board to ultimately determine whether it would review such decision. The question, therefore, narrows itself down to whether §110.09, F. S., as implemented by personnel board rules, by its terminology precludes an agency from initially petitioning the personnel board to exercise its discretion to review.

An examination of said §110.09 and the applicable rules of the state personnel board fails to specifically indicate that review is limited solely to "discharged employees." Conversely, there is no provision that specifically authorizes an agency to petition the personnel board to review. However, the terms of the statute and the rules and regulations of the board are sufficiently broad as to be susceptible to the construction that either an agency or a discharged employee may seek review. Ample justification for the foregoing may be found in the descriptive words used to denote the party seeking review as contained in the rules and regulations to wit: "the moving party," "parties" and "petitioner." While it may be stated that review was provided essentially for a "discharged employee" conceivably, situations may arise where the merit system council may reverse an agency's determination in discharging an employee, which decision would appear to be as reviewable as a decision affecting a discharged employee, if deemed proper by the state personnel board. Consequently, regardless of the absence of any specific provision authorizing an agency to seek review, if the personnel board in its own discretion deems it proper to do so it may afford the petitioning agency the opportunity to have its case reviewed.

It is my opinion, therefore, since the statute and rules in question place the matter of review in the hands of the personnel board, an agency could have a decision of the merit system council relating to discharged employees reviewed, if the personnel board in its discretion decides to grant such review. Your question is, therefore, answered in the affirmative, as modified above.

061-136—September 1, 1961

COUNTY SCHOOL SYSTEM

AUTHORITY OF THE COUNTY BOARD OF PUBLIC INSTRUCTION TO TRANSFER NONINSTRUCTIONAL PERSONNEL
—RECOMMENDATIONS OF COUNTY SUPERINTENDENT—
ENT—§§230.23(5), 230.34, 230.33 AND 231.35, F. S.

To: *Thomas D. Bailey, State Superintendent of Public Instruction, Tallahassee*

QUESTION:

Does the county board of public instruction have authority to make transfers of noninstructional personnel within the county school system without or against the county superintendent's recommendation?

In general, Florida constitutional and statutory provisions contemplate local control of public schools with final authority vested in the county board of public instruction except for the broad powers of review and regulation, vested in the state board of education and state superintendent of public instruction and the administrative control and authority delegated to the county superintendent of public instruction. In addition to this, various responsibilities and authorities are delegated by law to the boards of school trustees in the respective counties where such boards have not been abolished. The powers of school trustees under existing law, however, are largely advisory in nature.

Section 230.23, F. S., outlines the powers and duties of the county school board. Subsection (5) of this act relating to personnel provides, in part:

(a) *Positions and qualifications.*—Act upon recom-

mendations submitted by the county superintendent for positions to be filled and for minimum qualifications for personnel for the various positions.

(b) *Appointment; other than instructional staff and other employees in district schools.*—Act on written recommendations submitted by the county superintendent of persons to act as administrative, supervisory, attendance or health assistants, his office assistants, and bus drivers, and appoint persons to fill such positions.

(d) *Appointment of instructional staff and other employees.*—Act not later than six weeks before the close of school during any year on the nomination by the county superintendent of supervising principals or principals; act not later than four weeks before the close of school during any year on the nominations by the county superintendent of all other members of the instructional staff; and act on the nomination by the county superintendent of all other employees in such schools. *The county board may reject any supervising principal, principal, or other member of the instructional staff, or other employee nominated, and in case the second nomination by the county superintendent for any position be rejected, the said county board shall then proceed on its own motion to fill such positions.*"

(Emphasis supplied)

(g) *Transfer and promotion.*—Act on recommendations of the county superintendent regarding transfer and promotion of any employee, subject to the provisions of §§230.34-230.43.

Section 230.34 referred to in §230.23(5)(g) above, relates to the consolidation of school districts. Section 230.43 referred to in §230.23(5)(g) relates to the powers and responsibilities of school trustees. Section 230.33, F. S., provides for the duties and responsibilities of the county school superintendent. Subsection (7) of this act provides that the county superintendent shall "be responsible, as required herein, for directing the work of the personnel; subject to the requirements of Ch. 231, F. S., and in addition he shall have the following duties:

(b) *Recommend in writing to the county board persons to act as administrative, supervisory, attendance, or health assistants, his office assistants and bus drivers.*

(g) *Recommend employees for transfer and transfer any employee during any emergency and report the transfer to the county board at its next regular meeting.*"

(Emphasis supplied.)

Although the county school board has the responsibility for making the final decision on the employment or transfer of personnel, both instructional and noninstructional, it cannot ignore the recommendations of the county school superintendent. If the board rejects the recommendation of the superintendent it must be for good cause and the superintendent must be given an opportunity to make a second or even a third recommendation. Section 231.35, F. S., provides:

Appointment of employees.—All employees of the county school system shall be appointed as prescribed in chapter 230; provided that the terms "to consider the recommendations of" or "to act upon the recommendations of" shall be interpreted to mean that neither the trustees

nor the county board shall act on the appointment of employees without having considered any recommendations or nominations submitted as prescribed by law, that such recommendations or nominations may be rejected only for good cause, and that when any such rejection has been made, a second and if necessary a third recommendation or nomination shall be requested and if made within a reasonable time as prescribed by the county board, shall be considered or acted on as prescribed by law before the trustees or county board shall have a right to nominate or to appoint on their own motion; . . ." (Emphasis supplied)

In line with the above remarks, your question is answered that such transfers of noninstructional personnel cannot be made without the county superintendent's recommendation or recommendations if he timely decides to submit same and can only be made against his recommendation or recommendations after they have been duly rejected for good cause.

061-137—September 1, 1961

TAXATION

DOCUMENTARY STAMP TAXES ON DEEDS OF CONVEYANCE FROM FEDERAL HOUSING COMMISSIONER TO INDIVIDUALS; §§201.02, 201.08, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Are deeds of conveyance from the U. S., by and through the federal housing commissioner, to individuals, firms and corporations, subject to documentary stamp taxes under §201.02, F. S.?

The federal housing commissioner, as well as other like and similar federal agencies, in connection with the administration of federal housing statutes and laws, acquires title to real property through mortgage foreclosures and deeds of conveyance from mortgagors coming within the purview of the federal housing statutes and laws. These properties are sold and conveyed by the said housing commissioner, and other like and similar federal agencies, to individuals, firms and corporations purchasing the said properties from the said housing commissioner and other like and similar federal agencies.

In *Plymouth Citrus Growers Ass'n v. Lee*, 157 Fla. 893, 27 So. 2d 415, there was involved a promissory note made, executed and delivered, by the said Citrus Growers Ass'n, to a federal agency, which was held under §201.08, F. S., to be subject to taxation against the maker of the promissory note. Had the promissory note been made by the U. S. to some person, firm, or corporation, the result might have differed as to the tax liability of the U. S.; this being true, the above question is not ruled by said *Plymouth Citrus Growers Ass'n v. Lee*. The Florida documentary stamp taxing statute was taken largely from a federal act upon the same subject, in force and effect in 1931 when the Florida statute was first adopted. The federal courts have held that the phrase "who makes, signs, executes, issues, sells . . ." as used in the federal statutes, has reference to the maker of the document, and that the phrase "for whose benefit or use the same are made, signed, executed, issued . . ." has reference to the grantee, vendee, or payee of the document. (47 C.J.S. 784, §545, notes 7 and 8).

Under the above rule, although the maker of a document may be tax exempt, it does not follow as a general rule that the grantee, vendee or payee is likewise tax exempt. (See 51 Am. Jur. 278, et seq., §§218, et seq.; 84 C.J.S. 391, et seq., §§205, et seq.). Agents and instrumentalities of the U. S., used in the administration of governmental powers and duties, are usually held to be tax exempt (84 C.J.S. 492, et seq., §§255, et seq.). The principle that state and federal instrumentalities are exempt from taxation should be practically construed, and not extended to anything lying outside or beyond governmental functions. (84 C.J.S. 391-393, §206). Generally the immunity of federal agencies and instrumentalities from taxation applies only where they are engaged in governmental functions and where such taxation would tend to impair their usefulness or efficiency. (84 C.J.S. 393-400, §207). In the absence of congressional authority, the state may not lay any tax on the instruments, means and agencies provided or selected by the U.S. government to enable it to carry into execution its legitimate powers and functions. (84 C.J.S. 394, §207).

In *Laurens Federal Savings and Loan Ass'n*, 365 U.S. 517, 81 S. Ct. —, 5 L. Ed. 749, the federal home loan bank, and a federal savings and loan association located in the state, were each held to be federal instrumentalities so that a promissory note made and delivered by the local association to the home loan bank was deemed a federal instrumentality and exempt from state documentary stamp taxes. In *Federal Land Bank v. Bismark Lumber Co.*, 314 U.S. 95, 61 S. Ct. 1, 86 L. Ed 65, the land bank acquired a certain farm through a foreclosure of a mortgage held by it; and having acquired title to said farm purchased certain lumber and building material needed for necessary repairs. The state claimed and imposed a sales tax on the lumber purchased; the court held that the purchase of the building material was a governmental function and therefore exempt from the state sales tax. In *Pittman v. Home Owners' Loan Corp.*, 308 U.S. 21, 60 S. Ct. 15, 84 L. Ed 11, the said loan corporation had made a loan to a homeowner who secured the payment thereof with a mortgage encumbering his said home. When this mortgage was tendered by the loan corporation for record, the clerk of the court wherein it was required to be recorded, refused to record the same unless a mortgage tax was paid thereon in accordance with the laws of the state, and this was in addition to the recording fee. The mortgage was deemed by the court to be an instrumentality of the federal government, and exempt from the tax imposed. To the same effect, see *Federal Land Bank v. Crosland*, 261 U.S. 374, 43 S. Ct. 385, 67 L. Ed 703.

We are, therefore, of the opinion that a deed of conveyance from the federal housing commissioner to a purchaser of lands owned by the U. S., in connection with the administration of the federal housing statutes, is a federal instrumentality exempt from state taxation. Clerks of the circuit courts are without authority to refuse to record such deeds when presented to them for record, together with the proper recording fees, without demanding the payment of documentary stamp taxes.

061-138—September 6, 1961

**STATE AND COUNTY OFFICERS AND EMPLOYEES
RETIREMENT UNDER MERIT SYSTEM—CH. 61-289, LAWS
OF FLORIDA (§112.051, F. S.); CH. 110, F. S.**

To: Gerald L. Howell, Merit System Director, Tallahassee

QUESTIONS:

1. Are the provisions of Ch. 61-289, relating to retirement of certain state employees with tenure rights applicable to employees of the state and county retirement system?

2. Would the provisions of §2, Ch. 61-289 be applicable to employees who have attained the age of 70 prior to the effective date of this act?

3. What obligations does an agency have in notifying persons affected by the provisions of this act?

4. What effect will the provisions of said Ch. 61-289 have on the future employment by the merit system of persons 65 years or older?

Chapter 61-289 provides that any agency under the merit system may retire any employee on the basis of his age when such employee has reached the age of 65. No specification of charges or any other cause for such retirement is necessary, except that the employee must have attained the age of 65 and is eligible for retirement under any state retirement system. (§1, Ch. 61-289).

According to the provisions of §2 of said chapter, an employee over the age of 65 may in the discretion of the employing agency be continued in such employment until he has reached the age of 70, in which case he shall be automatically retired within 30 days after such 70th birthday unless:

(1) Such employee has submitted a request in writing to the state agency in which he is employed at least 60 days before his 70th birthday; and

(2) Such department has given written notice of consent for continuation of such employment.

Section 3 of said chapter provides that an agency may transfer an employee who has attained the age of 65 to a job requiring less responsibilities and less duties "when determination is made that such employee is not able to satisfactorily carry out the full duties of his position." In the event of such transfer, the employing agency is required to furnish the personnel board in writing the reasons for said transfer, a copy of which will be furnished to the transferred employee.

AS TO QUESTION 1:

In §1, Ch. 61-289 reference is made to the scope of the application of said chapter. The terminology used therein makes reference to "any employee of the state who is within the merit system established by Ch. 110, F. S." Reference is also made to any employee "who is protected by any other merit system plan or system providing for tenure," except instructional personnel employed on the public school system.

The phrase "or system providing for tenure" does not in my opinion contemplate "retirement systems." The word "tenure" has generally been defined to mean the right to hold. (State ex rel Wattawa v. Manitowoc Public Library Bd., 39 N.W. 2d 359, 255 Wis. 492). The word has often been applied to the rights of teachers

under the teacher tenure laws. It is stated in Words and Phrases, Vol. 14, p. 126 (pocket part) in defining tenure:

The right to perform duties does not exist until there is at least tenure or term of office, since "tenure of office" refers generally to the right to hold office subject to its termination by some contingency such as age, limitations, resignation, death, removal, etc., and "tenure" is sometimes held to be synonymous with "term of office" which ordinarily refers to a fixed period. *People ex rel Bagshaw v. Thompson*, 130 P. 2d 237, 241, 55 Cal. App. 2d 147.

An application of the general rules of statutory construction in construing the provisions of Ch. 61-289 leaves no doubt that the provisions of said chapter were intended to apply only to merit system plans or other similar systems. The general words "any other merit system plan or system providing for tenure" are associated with and take color from the specific words "merit system established by Ch. 110, F. S." This construction is referred to as the doctrine of "noscitur a sociis." (*State ex rel Wedgworth Farms, Inc. v. Thompson* 101 So. 2d 381). The entire act when read as a whole fails to indicate its applicability to a "retirement system"; in fact, nowhere in the entire act is reference made to any state retirement system.

In light of the above statements, it is my opinion that Ch. 61-289 applies to employees of the merit system or any similar system of personnel administration and does not include or embrace any state or county retirement system. Your question is therefore answered in the negative.

AS TO QUESTION 2:

A literal interpretation of §2 would seem to preclude its application to employees who have, prior to the effective date of this act, attained the age of 70. The time within which such employee could request continuance of employment would have elapsed had he attained the age of 70 prior to the effective date of this act. (See §2(1) of Ch. 61-289). The result of such literal interpretation would prevent an employee, who has attained the age of 70 prior to the effective date of this act, from being given the opportunity to continue his employment past the age of 70. Further, such literal interpretation may raise a constitutional question of equal protection since those who are on the verge of reaching 70 could request a continuance of employment while those 70 or older would have no such corresponding right.

It is my opinion that the legislature did not intend that such literal interpretation be given to §2. The legislative intent would appear to be to the contrary. In this regard, the courts of this state have often held that the practical purpose designated in the statutes should determine the force and effect of the words used in the statutes and that no literal interpretation should be given that lends itself to an unreasonable or ridiculous conclusion or purpose not designated by the law-makers. (*Smith v. Ryan* 39 So. 2d 281; see *Foley v. State ex rel Gordan* 50 So. 2d 179).

It should be noted that provisions of Ch. 61-289 will not take effect until Dec. 1, 1961. It would appear, therefore, that any employee who has prior to said date attained his 70th birthday should be permitted to submit a request in writing to the state agency in which he is employed for the purpose of requesting an extension. Further, any employee who has attained the age of 70

who would be precluded by the strict wording of the time requirement contained in §2 from giving the employing agency the proper notice, should be permitted to submit a request for continuance. The foregoing comments are intended to apply only to situations where an employee has attained the age of 70 prior to the effective date of this act or prior to the time within which he could have utilized or taken advantage of the notice provision contained in §2 of said act. It should be pointed out that the provisions of §2, Ch. 61-289 fail to indicate what matters should be embodied in the written notice of consent for continuance given by the employing agency. In other words, there is no indication as to how long such employment will be continued. In absence of such information it would seem that the employing agency should either specify the length of such continuance in its written notice of consent or specify that such continuance is at the discretion of the employing agency subject to termination at any time. Your question is therefore answered in the affirmative as modified above.

AS TO QUESTION 3:

Since the provisions of this act will not become effective until Dec. 1, 1961, every reasonable effort should be taken by the employing agency during this interim of time to notify all employees of the provisions of said chapter. This may be done by supplying each employee with a copy of Ch. 61-289. It would be particularly important to notify all employees 65 or over, particularly those on the verge of 70, so that they may have an opportunity to take advantage of the provisions of §2 of said act as discussed in question 2 above. It should be noted that the obligation of an agency as such would not in any sense be considered a legal one, but rather would be one performed in the best public interest of the employee. Your question is therefore answered accordingly.

AS TO QUESTION 4:

My comments expressed in answer to question 3 regarding notification of persons employed under the merit system are also applicable insofar as informing prospective employees. Persons between the ages of 65-70 would be eligible for employment under the merit system regardless of the provisions of Ch. 61-289. In other words, unless a person between the ages of 65-70 is eligible for retirement under any of the retirement systems the provisions contained in §1, Ch. 61-289, would not be applicable insofar as retirement is concerned. Such concerned person would, however, be subject to the provisions of §3 of said chapter, *supra*, referring to transfer of persons attaining the age of 65. Therefore, an agency could not retire a person between the ages of 65-70 if such person were subsequently hired, unless retirement was in accordance with the provisions contained in §1.

Prospective employees between the ages of 65-70, who are eligible for retirement under any of the retirement systems, but who nevertheless seek employment in an agency under the merit system would be hired on an extremely insecure status. In other words, such person after receiving a position under the merit system could conceivably be subject to retirement if the agency in its discretion so determined. This information should be conveyed to the prospective employee as well as the employing agency. There may be situations where an agency requires the particular services of an individual regardless of his age. The foregoing comments should not be construed as precluding the hiring of persons pres-

ently eligible for retirement under a state retirement system, but rather to point out that some procedure should be established in regard to this particular prospective employee whereby all parties concerned will be apprised of the situation in the event that such person is eventually hired.

My comments expressed in the foregoing paragraph regarding the instability of hiring persons between 65-70 who are eligible for retirement would also be applicable to the prospective employment of persons 70 years or older. Such persons could be hired, however, under the provisions of §2, Ch. 61-289, *supra*, they would be subject to compulsory retirement almost immediately after their employment. In other words, unless such person upon employment submitted a request for continuance within the time prescribed by §2 and such continuance was assented to by the agency such person's employment would be terminated. And if such person were 70 at the time he sought employment, there is extreme doubt as to whether he could even be employed because of the automatic termination provision in §2 and because of the inability to submit a request for continuance within the time prescribed by said section. The manner in which §2 has been drafted would seem to preclude the hiring of any person once he has reached the age of 70. I am unable to determine with any degree of certainty whether the legislature intended this effect. Your question is therefore answered accordingly.

It is hoped that the foregoing comments have provided the agencies under the merit system with a guide in the administration of the provisions of Ch. 61-289.

061-139—September 12, 1961

CORPORATIONS

SELECTION OF OFFICERS AND DIRECTORS OF PROFESSIONAL SERVICE CORPORATIONS—CH. 61-64, LAWS OF FLORIDA (CH. 621, F. S.)

To: *Tom Adams, Secretary of State, Tallahassee*

QUESTIONS:

1. Is it necessary that the members of the board of directors in a corporation formed under the professional service corporation act be licensed to practice the profession for which the corporation is organized?
2. Is it necessary that the officers in a corporation formed under the professional service corporation act be licensed to practice the profession for which the corporation is organized?
3. May a charter for a professional service corporation appropriately contain an article providing that in the event the ownership of shares of this corporation shall be transferred into the hands of others who are not qualified to own such shares under the provisions of the professional service corporation act, the members of the board of directors of this corporation shall have the power to fill any vacancy existing in the board of directors; and all of the directors and all of the shareholders of the corporation shall have the power to amend these articles of incorporation to effect a change in the nature of business authorized by this charter so that this corpo-

ration shall have the power to conduct any business authorized by Ch. 608, F. S.?

AS TO QUESTION 1:

It is noted that §§3(2), 5, 9 and 11 of Ch. 61-64 require all stockholders of a professional service corporation to be duly licensed or otherwise legally authorized to render the same professional services as those for which the corporation was formed. In construing acts of the legislature, legislative intent is the pole star by which we must be guided (*Ervin v. Peninsular Tel. Co., Fla., 53 So. 2d 647, Smith v. Ryan, Fla., 39 So. 2d 281, and Fla. State Racing Comm. v. McLaughlin, Fla., 102 So. 2d 574*). In this instance it would appear from the provisions of the law just cited that it was the legislative intent that professional service corporations be wholly owned and controlled by persons authorized or licensed to render the same professional service which the corporation was formed to render.

Inasmuch as the statute requires all stockholders to be duly licensed to engage in the profession for which the corporation was formed, this office would be inclined toward the position that it was the intent of the legislature that directors of a professional service corporation should also be required to be duly licensed members of the same profession for which the corporation was formed to render services since they as directors would have the authority to exercise even a greater degree of influence over the activities of the corporation than the ordinary stockholders.

Accordingly, question 1 is answered in the affirmative.

AS TO QUESTION 2:

On the basis of the authorities and discussion set out in the answer to question 1, this office is also inclined toward the position that officers of a professional service corporation must also be duly authorized or licensed to render the same professional services as those for which the corporation was formed and thus question 2 is answered in the affirmative.

AS TO QUESTION 3:

There is some question in the mind of the writer as to how shares of a professional service corporation could be transferred into the hands of others who are not qualified to own such shares in view of the provisions of Ch. 61-64. This comment is based on the following excerpts from §§9 and 11 of this chapter. Section 9, Ch. 61-64 provides in part that:

No corporation organized under the provisions of this act may issue any of its capital stock to anyone other than an individual who is duly licensed or otherwise legally authorized to render the same specific professional services as those for which the corporation was incorporated.

Section 11 of this act provides in part:

No shareholder of a corporation organized under this act may sell or transfer his shares in such corporation except to another individual who is eligible to be a shareholder of such corporation, . . .

Even though the statute provides in §§9 and 11 that the shares of professional service corporations may not be transferred to any one other than a duly authorized and licensed individual, it is foreseeable that an instance might arise where a corporation was owned by a single individual who might die intestate and under the statutes relating to descent and distribution his estate of which the corporation would be a part would pass into the hands

of his heirs who might not be licensed to engage in the profession for which the corporation was formed to render services. If such a condition should arise it would seem appropriate and not in conflict with the ethics of the profession to allow the corporation to gain a part of the tax advantage for which Ch. 61-64 was originally enacted by permitting the inheriting shareholders to amend the articles of the professional service corporation so that it might continue on as a general corporation to conduct other businesses authorized under the provisions of Ch. 608, F. S.

Question 3 is answered accordingly.

061-140—September 12, 1961

PUBLIC OFFICERS

NEPOTISM—SON-IN-LAW OR DAUGHTER-IN-LAW AS WITHIN §116.10, F. S.

To: L. O. Hansen, County Tax Assessor, Fort Lauderdale

QUESTION:

Is the son-in-law or daughter-in-law of a public officer in this state within the prohibition of §116.10, F. S., relating to nepotism?

Section 116.10, F. S., insofar as here material, states that "any state officer, member of state board, county officer member of county board or commission, city officer or his appointee who shall knowingly employ, either directly or indirectly, any person related within the fourth degree, either by consanguinity or affinity" to such employing officer, member, etc., "shall be deemed guilty of misfeasance and malfeasance in office", except as to the employment of only one person within such relationship. This statute prohibits the employment of any person related to the employing officer, member, etc., within the fourth degree either by *consanguinity* or *affinity*. This raises the question of what amounts to such relationship, and whether or not a son-in-law or a daughter-in-law is related to their parents-in-law by affinity. Such a relation is clearly not one of consanguinity, which is one of blood relationship, such as the relation of a parent and child (lineal) or uncle and nephew or niece (collateral) (15 C. J. S. 976), that is related to a common ancestor (*Capps v. State*, 87 Fla. 388, 100 So. 172, text 173).

Affinity is the tie arising from marriage, between the husband and the blood relatives of the wife, and between the wife and the blood relatives of the husband. In *State v. Wall*, 41 Fla. 463, 26 So. 1020, text 1021, the court stated that "no affinity exists between a brother of a wife and the brother of her husband . . . affinity only exists between a husband and the consanguineal of his wife, and vice versa, between the husband the consanguineal of her husband.

Here we have the marriage between the daughter (of the officer) and her husband, the son-in-law. Under the above rule the blood or consanguineal relatives of the wife became the relatives of her husband by affinity. The daughter-wife's blood or consanguineal relatives included her father, the officer in question. This being true, the officer and his son-in-law are related by affinity, through the marriage of his daughter to the son-in-law. The degrees of affinity are computed in the same way as those of consanguinity (2 C. J. S. 992, note 62). There are two methods used in computing degrees of kinship by consanguinity and affinity; one by the common law and the other by the civil law (26A C. J. S. 562, §22), under

either of which a child is within the third degree of kinship mentioned in §116.10, F. S., aforesaid. In *Miller v. Miller*, 55 Cal. App. 2d 199, 130 P. 2d 438, text 441, a child was held to be related to its parent in the first degree.

We are, therefore, of the opinion that a son-in-law or daughter-in-law of a public officer in this state is related to such officer within the fourth degree and within the purview of §116.10, F. S. The above stated question is answered in the affirmative.

061-142—September 12, 1961

REGULATION OF TRADE AND COMMERCE

AIRCRAFT AS MOTOR VEHICLES—INSTALLMENT SALES—

§§520.01-520.13, 520.30-520.42, 330.06-330.39, F. S.;

§13, ART. IX, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Do the installment sales of aircraft in this state come within the purview of the motor vehicle sales finance act, or the retail installment act, or neither?

Sections 520.01 - 520.13, F. S., regulate installment sales of "motor vehicles" as therein defined; while §§520.30 - 520.42, F. S., regulate so called retail installment sales. Under said §§520.01 - 520.13, *motor vehicles* are defined as devices "with a cash sale price of \$7,500 or less, including automobiles, motorcycles, motor trucks and all other vehicles operated over the public highways and streets of this state and propelled by power other than muscular power, but does not include traction engines, road rollers, implements of husbandry and other agricultural equipment and such vehicles as run only upon a track," (§520.02, F. S.). The above requirement that motor vehicles within said definition be "operated over the public highways and streets of the state" seems to exclude aircraft from its operation.

Sections 520.30 - 520.42, F. S., regulate the sale of "goods and services," as therein defined, through retail installment contracts, and revolving accounts, as therein defined. The term "goods," when used in said §§520.30 - 520.42, has been redefined by the amendment of §520.31(1), by §1, Ch. 61-398, to mean "all personalty when purchased primarily for personal, family or household use, including certificates or coupons issued by a retail seller exchangeable for personalty or services, but not including other choses in action, personalty sold for commercial or industrial use, money, motor vehicles, or construction, mining or quarrying equipment. The term 'goods' includes such personalty which is furnished or used, at the time of sale or subsequently, in the modernization, rehabilitation, repair, alteration, improvement or construction of real property as to become a part thereof, whether or not severable therefrom." The above definition seems to exclude personalty sold for commercial or industrial use, but seems to include personalty sold for personal, family or household use. An aircraft may be used for commercial or industrial use, as well as for personal and family use, the former use being excluded, but the latter use being included, from the retail installment sales statute. Motor vehicles are expressly excluded from the installment sales statutes by the above definition.

Section 520.31(2) defines motor vehicles as being devices or

vehicles "operated over the public highways and streets of this state and propelled by other than muscular power . . ." This seems to exclude aircraft from the definition of a motor vehicle. Aircraft do not run over the public highways, as contemplated by the above definition, and are not, therefore, motor vehicles so as to be included in the exclusion of motor vehicles.

Although aircraft are declared motor vehicles for the purposes of §§330.06 - 330.39 and §13, Art. IX, State Const., said provisions were never intended to classify aircraft as motor vehicles for all purposes. We know of no other statute or law defining aircraft as motor vehicles for all purposes.

From the above and foregoing we are of the opinion that aircraft sold at retail are not within the purview of §§520.01 - 520.13, F. S., not being motor vehicles as therein contemplated. However, unless within the exclusions mentioned in §520.31(1), F. S., as amended by §1, Ch. 61-398, aircraft would appear to be within the purview of §§520.30 - 520.42, F. S. This, from a study of the definition of "goods" as used in said §§520.30-520.42, aforesaid, would not extend to aircraft "sold for commercial or industrial use," but would extend to aircraft "purchased primarily for personal, family or household use." This same rule would seem to apply to services furnished in connection with the "delivery, installation, servicing, repair or improvement" aircraft used for personal, family or household use.

061-143—September 12, 1961

TAXATION

HOMESTEAD TAX EXEMPTION—APARTMENT IN MULTIPLE DWELLING UNIT—§7, ART. X, STATE CONST.

To: Grover C. Herring, City Attorney, West Palm Beach

QUESTION:

What are the rights of a person, otherwise qualified under §7, Art. X, State Const., claiming title to and residing in an apartment in a multiple dwelling unit and making the same his permanent home, to homestead tax exemption under said §7, Art. X, State Const.?

At this point in the opinion, we shall pass over the question of the title of the applicant to the apartment in question, and whether the title claimed is either a legal title or beneficial title in equity to real property, and discuss first the constitutional requirement that no homestead tax exemption "of more than \$5,000 shall be allowed to (1) any one person, (2) or to any one dwelling house, nor (3) shall the amount of the exemption allowed any person exceed the proportionate assessed valuation based on the interest owned by such person." When read and considered in connection with the previous sections of said Art. X, State Const., and in the light of the purpose and intent of said §7, Art. X, it is clear that the word "person" as used above relates to individuals alone and not to corporations and other entities. The homestead tax exemption claimant must be an individual who must claim the tax exemption in behalf of himself or in behalf of "another or others legally or naturally dependent upon said person."

Any one dwelling house.—We come next to the constitutional requirement that no homestead tax exemption of more than \$5,000 may be allowed to *any one dwelling house*. This presents the question

of what is a dwelling house within the purview of said §7, Art. X, State Const. In *Overstreet v. Tubin*, Fla., 53 So. 2d 913, the court considered the right of two owners of separate apartments in a two unit apartment house or duplex, to each claim a \$5,000 exemption upon the apartment owned and occupied by him. In this case "each unit of a duplex, or two family structure, the ownership of which structure is in two parties, each owning a divided one-half of said structure," was claimed as tax exempt by the respective owners, each claiming an exemption of \$5,000. The court held that the entire building, comprising the two living units, constituted but a single dwelling house. In this case the court said that "we think, then, that the only reasonable interpretation of the words 'dwelling house,' as used in §7 Art. X, is that the whole structure of a multiple dwelling house, rather than each separate unit thereof, is meant; and it follows, therefore, that each owner of a separate unit is entitled to claim only his proportionate part of the \$5,000 tax exemption, based on his proportionate part of the assessed valuation of the entire structure." The structure involved in this case was "so was called 'duplex' or two family dwellings, each unit being owned in fee simple by separate owners, having separate plumbing and electrical wiring, separate entrances and walkways, and being connected only by an eight-inch party wall."

In *Gautier v. State*, ex rel *Safra*, Fla. App., 127 So. 2d 683, the district court of appeal, 3rd Dist., considered a like application by the owners and occupants of four apartments in a multiple unit apartment house, such applicants being "the owners of a dwelling unit within a multiple family building, the various dwelling units being separated by party walls. The appellees purchased their home as separate dwellings, received a separate deed, and encumbered the same to a lending institution and are assessed separate and apart from adjacent family owners." The court, following *Overstreet v. Tubin*, supra, held the multiple unit apartment house a single dwelling house within the purview of §7, Art. X, State Const., so that the \$5,000 tax exemption was divided among the four applicants, each being allowed an exemption of \$1,250.

Reason for the one dwelling limitation.—The following extract from the *Overstreet v. Tubin* opinion may shed some light upon the intent and purpose of the limitation to a single dwelling house, to wit:

While there is no evidence here of bad faith on the part of the appellees, it is entirely possible that "the skill of the architect can be utilized" to plan a multiple dwelling containing even more than two units, each unit being separately owned, and together occupying less than the one-half acre contemplated under our constitution as being the extent of only one homestead in cities and towns, and which would result in serious revenue losses to the local taxing authorities. Paraphrasing the language of this court in *Smith v. Guckenheimer*, above quoted, we think it may fairly be said that "To prevent such a condition of affairs was the evident purpose of the quoted limitation of the constitution upon the exemption of homesteads from taxation, when it declares that 'no such exemption of more than five thousand dollars shall be allowed to any one person or any one dwelling house, . . .'" (Emphasis supplied.)

Exemption limited to interest of homesteader.—Under the

provisions of §7, Art. X, State Const., the amount of the exemption allowed an applicant for homestead tax exemption may not "*exceed the proportionate assessed valuation based on the interest owned by such person*" in the property occupied by him. Under this portion of the homestead tax exemption provision of the Florida constitution, an occupant of an apartment, owned in whole or in part by him, may not receive homestead tax exemption in excess of the "proportionate assessed valuation (of the apartment occupied by him) based on the interest owned by such person." This is a further limitation upon the homestead rights of the apartment owner, and is in addition to the above limitation upon the apartment building above discussed.

Although little difficulty concerning title seems to arise where the apartment building is a single story one, with title to each separate apartment vested in separate claimants or occupants; however, where the apartment building has two or more stories, each story divided into separate apartments, with separate ownership of the apartments themselves, the question of title becomes complicated. To meet this dilemma at least three schemes are used (1) a common ownership of the apartment building, each apartment claimant owning an undivided interest in the building itself, with an exclusive right of occupancy of a designated apartment, (2) vesting of title to the apartment building in a trustee, in trust for the apartment occupants or claimants, with such occupants and claimants being given the exclusive right to occupy a specified apartment, (3) vesting title to the apartment building in a cooperative association or corporation, whose members or stockholders are the occupants of the apartments, each such member or stockholder being assigned the exclusive right of occupancy of a specified apartment, and (4) vesting the title to each separate apartment in its occupant or claimant.

Under the first class of ownership, each occupant or claimant of an apartment is a tenant in common with every other occupant or claimant of an apartment, in and to the apartment building and the lands upon which it is located. If there are five stories of three apartments on each floor, each occupant or claimant would own an undivided one-fifteenth interest in the apartment occupied or claimed by him; his interest in the apartment occupied or claimed by him would be an undivided one-fifteenth interest. He would also own an undivided one-fifteenth interest in every other apartment in the apartment building. This would bring such occupant and claimant within the one dwelling house limitation and the title interest limitation, each above mentioned and referred to.

Under the second class of ownership, the trustee would be vested with the legal title to the building and the occupants and claimants with the equitable title, in like manner as they own the legal title under the first class of ownership above discussed.

Under the third class of ownership, the legal and equitable title to the apartment building, and the apartments therein, would be vested in the incorporated association or corporation, and the interest of each occupant or owner would be that of a stockholder or membership. Under the statutes of Florida the interest of stockholders or members in incorporated associations or corporations is personalty and not real property (§608.42, F. S.; 18 C. J. S. 622, §194; 13 Am. Jur. 298 and 299, §173; Bee Branch Cattle Co. v. Koon, Fla., 44 So. 2d 684, text 689). Under this plan the occupants

and claimants of the apartments have not the legal or beneficial title in equity required by §7, Art. X, State Const., to entitle one to the homestead tax exemption provided by said §7.

Under the fourth class of ownership, we are confronted with serious questions as to the nature of the right, title or interest vested in the holder of an instrument purporting to convey the title to an apartment in a multiple story apartment building. In other words, may the owner of a multiple story apartment building convey legal or beneficial title in equity to an apartment located on the second or upper story of such building, separate and apart from the title to the land itself and from other apartments in the building.

The statement is made in 2 Tiffany Real Property, 3rd ed., 624 and 625, §626, that "parts of a building may be owned by different persons in fee simple, as where an upper floor belongs to one person, and the lower to another, or separate rooms, or even parts of rooms, belong to different persons." In 16 Am. Jur. 443, §9, it is stated that "a person who owns the entire estate in real property may sell and convey any part of it. It may be divided *horizontally, perpendicularly, or in any manner according to the will of the owner*, even to the extent of granting a freehold interest in a part of a building, although conveyances of the latter kind, like leases of apartments in buildings, must be construed according to the intention of the parties and with reference to the subject matter upon which they operate . . ." In 26 C. J. S. 605, §15, the statement is made that a "grantor has the right to divide his holdings by horizontal planes or lateral lines."

It is stated in 1 Thompson on Real Property, Permanent Ed., 70, §63, citing *Doe v. Burt*, 1 Term Reports 701, text 703, that "in London different persons have different freeholds over the same spot; different parts of the same house are let to different people. That is the case in inns of court. Now, it would be very extraordinary to contend, if a person purchased a set of chambers, then leased them, and afterwards purchased another set under them, the after purchased chambers would pass under the lease." Like and similar expressions are found in *Graciosa Oil Co. v. Santa Barbara County*, 155 Cal. 140, 99 P. 483, text 486, 20 L. R. A. (NS) 211; *Kidwell v. General Petroleum Corp.*, 212 Cal. 720, 300 P. 1, text 4, 76 A. L. R. 830; *Buelah Coal Mining Co. v. Heihm*, 46 N. D. 646, 180 N. W. 787, text 789; *Pifer v. Taylor*, 48 N. D. 967, 188 N. W. 171, text 172; *Harrington v. Watson*, 11 Or. 143, 3 P. 173, text 175; *Hahn v. Baker Lodge*, 21 Or. 30, 27 P. 166, 13 L. R. A. 158, 28 Am. St. Rep. 723; *Pearson v. Matheson*, 102 S. C. 377, 86 S. E. 1063, text 164 and 165; *Griffin v. Fairmont Coal Co.*, 59 W. Va. 480, 53 S. E. 24, text 27, 2 L. R. A. (NS) 1115. 1 Am. Law of Property, 198-202, §3.10; 4 Powell Real Property, 709 to 711, §§6 and 32; and 2 Washburn on Real Property, §342.

"The interest of the occupier of a room in a building is peculiar; he has simply the right of occupation, and a destruction of the building ends that right," (Ann. in 13 L. R. A. 159) in the absence of contrary provisions in the deed or lease. Some cases hold that the sale and conveyance of a part of a building, located on the second or upper story of a building is a mere easement to the part conveyed (Ann. in 13 L. R. A. 158-160). Perpetual easements to real property are in law freehold interests; they are estates in the land (1 Thompson on Real Property, Perm. Ed., 528-530, §331). Although perpetual leases are not favored in law,

nevertheless where the intention to create one is clear and unambiguous, it will be deemed valid and enforceable (see 51 C. J. S. 606, §61). Permanent or perpetual easements have been recognized (see 28 C. J. S. 715 and 716, §51). Perpetual easements have been held to be freehold interests in land (28 C. J. S. 621, §1, note 16). See also 17 Words and Phrases 649, 656 and 657, regards perpetual leases and easements as freeholds.

Although we doubt that conveyance of a room or apartment in a multiple story apartment building, especially when located on the second or upper story, would be a conveyance of real property to the extent of a deed of conveyance of the building and the lands upon which located, such a conveyance of a room or apartment is nevertheless a legal title in the nature of a perpetual lease or easement, sufficient to support an application for homestead tax exemption under §7, Art. X, State Const., except where for a term of years. Leasehold interests for a term of years are deemed personal property and not real property or chattels personal. However, such apartments are subject to the constitutional provision that no homestead tax exemption of "more than \$5,000 shall be allowed to any one person or on any one dwelling house (the apartment building and not a single apartment being deemed the dwelling house under current court opinions) nor shall the amount of the exemption allowed any person exceed the proportionate assessed valuation on the interest owned by said person." (Emphasis supplied.)

No attempt has been made here to answer specific questions as to all homestead tax exemption claims for apartments, but we have tried to furnish general information as to homestead tax exemptions claims based on apartments in multiple apartment houses generally.

061-144—September 12, 1961

RETIREMENT

STATE AND COUNTY OFFICERS AND EMPLOYEES—
DRAINAGE DISTRICTS—CHS. 122, 298; §§122.02(1),
298.01, F. S., CHS. 6456, 1913; 14717, 1931; 57-1877,
59-1902, LAWS OF FLORIDA.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

What districts are included in the term "drainage districts" as used in §122.02(1), F. S., relating to state and county officers and employees retirement?

The phrase "state and county officers and employees" as used in Ch. 122, F. S., providing a retirement system for state and county officers and other specified persons, is defined in said subsection as including "all full-time officers or employees who receive compensation for services rendered from state and county funds or from funds of drainage districts or mosquito control districts of a county or counties" The term "drainage districts," as used above, is not defined in said Ch. 122, F. S., and must therefore, for the purposes of this opinion, be determined.

Under Ch. 298, F. S., drainage districts may be formed "for the purpose of having such lands reclaimed and protected from the effects of water, for sanitary or agricultural purposes, or when the same may be conducive to the public health, convenience or

welfare, or of public utility or benefit, by drainage or otherwise" (§298.01, F. S.). Section 1, Chapter 6456, 1913, establishing the Everglades drainage district, recited that its purpose was draining and reclaiming the lands of the district and "reclaiming the same from the effects of water for agricultural and sanitary purposes, and for the public convenience and welfare, and for the public utility and benefit." Section 1, Ch. 14717, 1931, which reorganized the said Everglades drainage district, contained a substantial identical provision to the above quoted one from the 1913 act. It is stated, in 28 C. J. S. 231, §1, that "drainage as applied to land ordinarily contemplates the removal of water therefrom by means of an artificial channel or trench, but it may also include the construction of such ditches, drains and embankments or levees as may be necessary to prevent the accumulation of water." "A majority of the courts seem to regard almost any kind of drainage or sewerage work as being of general benefit or as constituting a public function if there is a reasonable prospect that it will operate in some degree to the common weal." (17A Am. Jur. 442 and 443, §6).

Taking for the purpose of an example the Sumter county recreation and water conservation and control authority, created and established by Ch. 57-1877, as amended by Ch. 59-1902, in which acts it is recited that Sumter has within its boundaries lands producing citrus fruit, vegetables, and other farm products requiring an adequate supply of fresh water, as well as humans and animals which also require an adequate supply of fresh water. In the county there are many streams, lakes and canals, including lake Panasoffkee, emptying into the Withlacoochee river, the proper control of which, *by drainage, irrigation and storage* is necessary to the material development of the county, (§1, Ch. 57-1877). The said authority is given power to "enlarge, change, modify, or improve any stream, lake or canal within the territorial limits of the authority and to clean out, straighten, enlarge, or change the course of any waterway or canal, natural or artificial, . . . to provide such canals, locks, levees, dikes, dams, sluiceways, reservoirs, holding basins, floodways, pumping stations, buildings, bridges, highways and other works and facilities which the board may deem necessary . . ." (§12, Ch. 57-1877).

It is recited in the preamble to the act of 1957, that the water level in the above mentioned lakes, streams and canals has become dangerously low, making it necessary, for the protection of the citrus, vegetable and farming industry in the county, that a uniform and constant water level be maintained in such lakes, streams and canals. From said legislation we gather that the purpose of the said legislation is the control of the water level in the area mentioned by canals, locks, levees, dikes, dams, and other structures and works. To accomplish this it will be necessary to maintain an adequate drainage, storage and control system to drain the excess water from the area in wet weather, and at the same time maintain sufficient storage and conservation of the water to maintain the required water level in dry seasons.

We are, therefore, of the opinion that where one of the primary purposes of a district is the drainage of water from lands, to improve its use for citrus, vegetable and other farming, such a district is within the state and county officers and employees retirement system, although the district also exercises other features of water control in its area.

061-145—September 13, 1961

**REGULATION OF PROFESSIONS AND VOCATIONS
BULL TESTING BY NONVETERINARIAN NOT IN
VIOLATION OF CH. 474, §474.07, F. S.**

To: *E. F. Thomas, DVM, Secretary-Treasurer, Board of Veterinary Examiners, Sarasota*

QUESTION:

Does the service rendered by nonveterinarians to ranchers known as "bull testing" constitute the practice of veterinary medicine?

The practice of veterinary medicine and surgery or of veterinary dentistry in this state by any person is defined in §474.07, F. S., as follows:

"Practicing veterinarian" defined; exceptions.—Any person shall be regarded as practicing veterinary medicine and surgery within the meaning of this chapter who professes publicly to be a veterinary surgeon, doctor or dentist, or who appends to his name any initials by prefix, affix, or title implying qualifications to practice the same, or who shall operate on, or prescribe for, or administer any medicine, or any biologic preparation to, either as a cure or preventive for any disease, or who shall treat any physical ailment in, or any physical injury to, or deformity of, any animal, and who shall charge or receive therefor money or other compensation of any kind or character, directly or indirectly. Provided, however, that nothing in this chapter shall be construed to prevent any persons or livestock owners from administering to the ills or injuries of their own animals. (Emphasis supplied.)

We are advised in a letter dated July 19, 1961, by associate physiologist A. C. Warnick of the department of animal science, agricultural experiment station of the university of Florida that the technique of "bull testing" as contemplated in the above question does not involve the use of treatments or medication in any respect.

To quote from Dr. Warnick's reply to my letter of June 19, 1961, as follows:

The test is primarily concerned with the collection and evaluation of the semen to estimate its probability of settling cows under natural breeding conditions. There are some technicians who have had considerable experience in semen work and should be equally qualified as the veterinarian. Thus, I feel their training qualifies them for such examinations.

In addition, the group of veterinarians affiliated with the society for the study of breeding soundness gives the bull a physical examination for any "abnormalities." In this case, the technician may not have adequate training to do what their society specifies.

However, considering the overall problem, I feel the nonveterinarian should be allowed to test bulls. There are no "treatments or medication involved". (Emphasis supplied.)

It is also my understanding: First, that there is "no surgery" or entry made into the internal organs during this process; second,

that any person employing such technique, in this phase of animal husbandry, does not profess or imply in any way that he is a veterinarian; and, third, that the physical examination, including the taking of a blood sample, to determine if any diseased condition is present, which might affect the breeding qualities of the bull, is performed by licensed veterinarians.

This opinion is restricted solely to the application of the definition of veterinarian practice in §474.07, supra, and to the technique of "bull testing" in Dr. Warnick's letter, as a different method employed to determine the fertility of a bull may prompt a different conclusion.

Therefore, when considering this technique of "bull testing" in the light of the definition in said §474.07, supra, we find that the practice of veterinary medicine requires substantially the following acts on the part of a nonlicensed person to place him in violation of the veterinary practice act:

First, the person shall have publicly professed to be a veterinarian; second, assumed a title which would imply to the public that he has the qualification of a veterinarian; third, he shall have practiced one or more of the arts of treating diseases, injuries, or deformities of animals surgically or medically (Tucker V. Williamson 229 F-201) and, fourth, he shall have charged or received compensation for such medical or surgical services administered.

In view of the foregoing, it is my opinion that a person engaged in the collection of semen and the laboratory evaluation thereof, as described herein, is not practicing the art of treating diseases or injuries of animals as contemplated by Ch. 474, F. S. Although "he may accept compensation for such service rendered," it would appear that "the two other primary elements which constitute the practice of veterinary medicine, are absent."

061-146—September 13, 1961

REGULATION OF TRADE AND COMMERCE

MORTGAGE BROKERAGE ACT(CH. 494, F. S.)—CONSTRUCTION OF BONA FIDE RESIDENT AS USED IN §494.04(2), F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Who is a "bona fide resident of the state for a period of at least six months," within the purview of §494.04(2), F. S.?

Said §494.04(2), F. S., provides that "no mortgage broker's license shall be granted to any person who has not been a bona fide resident of the state for a period of at least six months immediately preceding the date of application for license." (Emphasis supplied.) The phrase "bona fide resident" as used in said subsection (2) is not defined within Ch. 494, F. S. The terms "bona fide" are Latin terms meaning by or in good faith. The term has been referred to as meaning good faith, as distinguished from bad faith (11 C. J. S. 387). It has been said to be the equivalent of, and synonymous with, "good faith" and "honesty" (11 C. J. S. 388). Therefore, a bona fide residence is one established honestly and in good faith and for a lawful purpose. The term

"bona fide residence" has been said to be one established with domiciliary intent (28 C. J. S. 5, note 14).

Although the terms "residence" and "domicile" are frequently used as synonymous terms, they have been said, when accurately used, not to be convertible terms (28 C. J. S. 5, §2; 11 Fla. Jur. 5, §5; Robinson v. Fix, 113 Fla. 151, 151 So. 512, text 513; Minick v. Minick, 111 Fla. 469, 149 So. 483, text 488). In Robinson v. Fix, and Minick v. Minick, supra, it was stated that "domicile" is of more extensive signification "as it includes beyond mere physical presence and particular locality, positive or presumptive proof of intention to constitute it a permanent abiding place, whereas 'residence' has a more limited, precise and local application than 'domicile', which is used more in reference to personal rights, duties and obligations." It is stated in 17A Am. Jur. 201, §9, that "'residence,' as legal term, is something more than a mere actual presence in a locality, even where it is not equivalent to domicile. For example, a mere temporary absence of a few weeks will not constitute a person a nonresident, if at the time of departure there is an intention of returning at the expiration of that period; nor will his mere presence in a place unaccompanied with any intention to remain there for any length of time constitute a residence."

In Smith v. Voight, 158 Fla. 366, 28 So. 2d 426, the court considered the right of an alien residing in this state, to qualify as a homesteader under §7, Art. X, State Const., as amended at the general election in 1938, under the requirement that a homesteader, to be entitled to the exemption, "in good faith make the same his or her permanent home" It was held that an applicant for homestead tax exemption need not be a citizen of this state if he maintained a permanent home on the property claimed as tax exempt. We are inclined to the view that the legislature when it adopted §4, Ch. 59-309, now appearing as §494.04, F. S., used the term "bona fide resident of the state," in the sense of a permanent resident or person maintaining a permanent home in this state, within the purview of §7, Art. X, State Const.

We, therefore, hold that a "bona fide resident of the state for a period of at least six months," within the purview of §494.04, F. S., is comparable to the permanent home requirement of the homestead tax exemption amendment of the Florida constitution. The same evidence required for proving that one has established a permanent home would seem sufficient to prove a bona fide residence under §494.04, F. S.

061-148—September 19, 1961

TAXATION

HOMESTEAD EXEMPTION—CUBAN REFUGEES—§7, ART. X, STATE CONST.; §192.14, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

May a Cuban alien refugee, otherwise entitled to homestead tax exemption, be entitled to such exemption when he holds only a temporary visa, if he can establish that he is prevented from obtaining a permanent visa by reasons beyond his control; i.e., absence of U. S. consular officers in Cuba and political unrest?

You state in your letter that at the present time, tax assessors of the various counties in this state are confronted with the

question of whether they should grant homestead tax exemption claims of citizens of Cuba who are residing in Florida without permanent visas, not through any fault of their own but by reason of the poor political conditions existing in Cuba. Under §7, Art. X, State Const., "every person who has the legal title or beneficial title in equity to real property in this state and who resides thereon and in good faith makes the same his or her permanent home . . . shall be entitled to an exemption taxation. . . ." Said §7, Art. X, was amended in 1938. Prior to the amendment that section provided that "there shall be exempted from all taxation . . . to every head of a family who is a citizen and resides in the state of Florida" his homestead as defined by said section. It seems evident by comparison of the above constitutional provisions that a material change was made in the constitutional provision by the 1938 amendment. The prior constitutional provision required residence and citizenship; the present provision requires residence and the making of the property one's permanent home. A property owner may be entitled to homestead tax exemption notwithstanding he may be a citizen of another state or country, so long as he resides permanently in this state (*Smith v. Voight*, 158 Fla. 366, 28 So. 2d 426).

Section 192.14, F. S., defines the term "permanent residence," as used in constitutional and statutory homestead exemption provisions, as follows:

192.14 *Homestead exemptions; definitions.*—The words "resident," "residence," "permanent residence," "permanent home" and those of like import, shall not be construed so as to require continuous physical residence on the property, but mean only that place which the person claiming the exemption may rightfully and in good faith call his home to the exclusion of all other places where he may, from time to time, temporarily reside.

"The residence of a party consists of facts and intention. *Warren v. Warren*, 73 Fla. 764, 75 So. 35, L.R.A. 1917 E. 490. Residence indicates place of abode, whether permanent or temporary. *Minick v. Minick*, 111 Fla. 469, 149 So. 483. A resident is one who lives at a place with no present intention of removing therefrom. *Tracy v. Tracy*, 62 N.J.E. 807, 48 A. 533." (*Kiplinger v. Kiplinger*, 147 Fla. 243, 2 So. 2d 870, text 873; *Fowler v. Fowler*, 156 Fla. 316, 22 So. 2d 817, text 818.)

A "permanent resident" has been defined as a person who has a settled and fixed abode with an intention of remaining there permanently (*Howard v. Queen City Coach Co.*, 212 N. C. 201, 193 S.E. 138, text 140; *MacLeod v. Steele*, 43 Idaho 64, 249 P. 254, text 256); a person who dwells permanently or for a considerable length of time in a particular abode (*Houston Prtg. Co. v. Tennant*, Tex., 39 S.W. 2d 1089, text 1090); a person whose habitation is fixed without a present purpose of removing therefrom (*Reckling v. McKinstry*, 185 Fed. 842, text 843).

In AGO 054-158, July 9, 1954, this office held that a person in this country, under a temporary visa, cannot meet the requirement of permanent residency necessary for homestead tax exemption. Are there any special circumstances which would except Cuban refugees from the holding of our previous opinion? To answer this question, we must first determine the legal status of these refugees.

In "The Department of State Bulletin," the official weekly

record of U. S. foreign policy, Jan. 9, 1961, at p. 46 in an "Interim Report on the Cuban Refugee Problem," we find the following remark:

As to the Cubans, a very different situation exists. They have entered the U. S. in many ways: some with no visas; some on regular immigrant visas; some on a "parole" status, . . . ; and a very large majority technically as tourists.

But these Cubans are really refugees rather than tourists, for they cannot safely return home.

The "Bulletin," Aug. 7, 1961, at p. 238, points out in discussing a state department press release regarding the Cuban situation that "the immigration and naturalization act gives the secretary of state and the attorney general, jointly, discretionary authority to waive visa requirements on the basis of unforeseen emergencies in individual cases . . ." That same press release indicated that some Cuban refugees have visas and that some have entered this country under waivers of visas.

Regardless of how or under what circumstances these unfortunate people have entered this country, it appears that all of them, except those who are already American citizens, are, in international law terminology, "refugees" who have been granted "political asylum." We quote from the "Bulletin," Dec. 12, 1960, p. 889, as follows:

It has long been the policy of the United States to grant asylum to refugees fleeing from political persecution and oppression. In the case of Cuba, the United States now is the country of first asylum for a large number of refugees who have sought a safe haven on our shores.

From the October 31, 1960, "Bulletin," at p. 695, we find this remark:

. . . It is not surprising that many Cubans who value freedom have gone into exile—some of them in the United States. Here they enjoy the traditional right of political asylum

What is meant by "political asylum"? From Hackworth, Digest of International Law, Vol. III, p. 734, we note:

. . . It is the traditional policy of the government of the United States to grant refuge in its territory to persons whose lives are believed to be in jeopardy as a result of their political activities in a foreign country. Such persons applying for admission to the United States as so-called political refugees are customarily admitted for a *reasonable period* under a liberal interpretation of the immigration laws, provided they can establish to the satisfaction of the competent authorities that their personal safety is actually threatened and that the offenses in which they may have been involved are not such as would render them inadmissible under the law (Emphasis supplied.)

It appears from the above quote and other international law authorities examined that "political asylum" does not carry with it any degree of permanency. It is our opinion that, until such time as a refugee obtains a permanent visa or some other document allowing establishment of residence on a permanent basis in this country, such person must necessarily be considered a temporary resident.

Letters of President Kennedy indicate that the executive

branch of the federal government considers the status of Cuban refugees to be temporary. In a statement by the president outlining measures for aiding Cuban refugees, reported in "The Department of State Bulletin," Feb. 27, 1961, pp. 309 and 310, the president directed Mr. Ribicoff, secretary of health, education and welfare, to "provide supplemental funds for the resettlement of refugees in other areas, including transportation and adjustment costs to the new communities and for their eventual return to Miami for repatriation to their homeland as soon as that is again possible."

On the basis of the above, we must assume the position that Cuban refugees in the U. S. under temporary visas or under waivers of visas cannot be deemed permanent residents as will entitle them to homestead tax exemption under Art. X, §7 of the Florida constitution, unless and until they have otherwise established permanent residence in this state, pursuant to law.

061-149—September 19, 1961

STATE AGENCIES

STATUS OF FLORIDA DEVELOPMENT COMMISSION—
POWER TO ISSUE REVENUE CERTIFICATES—CH. 288;
§§288.13, 288.15, 288.151, F. S.; §10, ART. IX,
§6, ART. IX, STATE CONST.

To: *Ben Dickens, Attorney, Florida Development Commission,
Tallahassee*

QUESTION:

What is the legal status of the Florida development commission? More specifically, is it an instrumentality or agency of the state as contrasted to the state itself and does it have authority to issue revenue certificates without pledging the credit of the state?

The Florida development commission was created by Ch. 29788, 1955. Its purpose and authority are set forth in Ch. 288, F. S. Section 288.13, F. S., provides:

Cooperation with other units, boards, agencies and individuals.—Express authority and power is hereby given any county, municipality, drainage district, road or bridge district, school district or any other political subdivision, board or commission in the state to make and enter into with the commission, contracts and leases, within the provisions and purposes of this chapter. The commission is hereby expressly authorized to make agreements with and enter into any and all contracts with any political subdivisions of the state.

Among other things, authority is vested in the commission by §288.15, F. S.:

(6) In order to carry out the objectives and purposes of this chapter the commission is authorized to acquire, own, construct, operate, maintain, improve and extend public buildings, facilities or works within the state which are of the character hereinafter specifically mentioned. All public buildings, facilities and works which the commission is authorized to own, construct, operate and maintain must be such as can ultimately be owned and operated by an agency, department, board, bureau or commission of the state. All or any such buildings,

facilities or works may be of a revenue producing character in order that the cost of the same or some part thereof, improvements or extensions thereto may be paid from receipts therefrom including in Tallahassee only rentals, leases and sales to both public and nonpublic agencies through the issue and sales or disposition of revenue bonds, notes or certificates of said commission. . . . (Emphasis supplied.)

(6) (e) Public buildings, facilities and additions or improvements to existing buildings and facilities for ultimate use in connection with any of the several state institutions, departments, bureaus, boards or commissions, and in furtherance of this paragraph, the board of commissioners of state institutions and the state board of education are authorized to cooperate with the commission and to do and perform all acts and things necessary thereto. *Any property acquired by the commission under the provisions of this chapter may ultimately be conveyed to the state free and clear of all debt or other encumbrance.* (Emphasis supplied.)

(6) (f) *Said commission is hereby authorized to collect reasonable rentals, tolls or charges for the use of public buildings, facilities or works constructed, acquired or owned by it and for the products and services of the same exclusively for the purpose of paying the expenses of improving, repairing, maintaining and operating its facilities and properties and paying the principal and interest on its obligations.* . . . (Emphasis supplied.)

Section 288.151, F. S., provides, in part:

Issuance of bonds, notes, etc., of commission.—The commission shall further have power and be authorized, notwithstanding the provisions of any other law or laws to the contrary, to issue its bonds, notes or certificates as provided in this chapter for the combined purpose of refunding any outstanding bonds, notes or certificates theretofore issued for any project or projects, and the acquisition or construction of any new project or projects, or the improvement of any existing project or projects, or any combination of two or more projects, whether new projects or existing projects; . . .

Acting pursuant to its authority, the commission has on numerous occasions, in order to accomplish the construction of public buildings and other public facilities, acquired lands from the state and other governmental bodies and constructed buildings on the lands from the proceeds of revenue certificates issued by the commission. The buildings are then leased to a state institution, department, bureau, board, commission or local unit of government by the commission and the rentals derived therefrom used to retire the revenue certificates. Ultimately, when the revenue certificates are paid in full, the land and buildings are conveyed back to the said state agencies or other governmental subdivision in whose behalf the commission is acting.

In my opinion, the legislature in creating the commission has made a clear distinction between the commission as an instrumentality or agency of the state which it is intended to serve and the state itself.

The various revenue certificates issued by the commission have

in many instances been validated by the supreme court of Florida which recognized that the commission did not and could not pledge the credit of the state itself since such action is prohibited by §6, Art. IX, State Const. (*State v. Florida State Improvement Comm.*, 84 So. 2d 707; *State v. Florida State Improvement Comm.*, 30 So. 2d 97; *State v. Florida State Improvement Comm.*, 48 So. 2d 156).

In *State ex rel Watson, Attorney General, v. Caldwell, Governor, et al.*, 23 So. 2d 855, the Florida supreme court in commenting upon the powers and legal status of the state improvement commission (predecessor of the state development commission with similar powers), held that:

The section of statute creating state improvement commission, authorizing commission to fix rentals, tolls and charges for use of public buildings, is not unconstitutional as authorizing issuance of state bonds for illegal purpose, in view of provision that obligations and securities undertaken shall be solely the obligations of commission and shall be secured only by such revenues as shall be placed as security for payment thereof. F.S.A. §§420.02, 420.06(11); F.S.A. Const. Art. 9 §6.

Evidences of debts secured solely from rents and facilities of state improvement commission are not "bonds" that must be approved by freeholders as required by constitution. F.S.A. Const. Art. 9, §6.

In view of the above, it is my opinion that the Florida development commission is an instrumentality or agency similar to a private corporation, created solely to serve public needs of the state government and county and municipal governments. The commission is limited in its authority to issue revenue certificates to those projects which will produce revenue in one form or another which can be used to retire said revenue certificates and in no instance does the commission have authority to pledge the credit of the state itself.

The state cannot obligate itself for debt because under §10, Art. IX, State Const., credit of the state cannot be pledged or loaned to anyone and because under §6, Art. IX, State Const., the state cannot issue state bonds except to repel invasion or suppress insurrection. The commission, in effect, provides the state and local agencies a service which only private individuals or corporations otherwise could provide in the construction or acquisition by leasing or purchasing of building facilities. The commission cannot obligate the state for debt, but it may obligate itself within the limits of revenues which the state agencies may wish to pay for such facilities but without binding obligation or interest commitment. Thus, the commission operates in a quasi public and private capacity; is not the state itself but stands similar to a private service corporation.

061-150—September 21, 1961

COUNTY OFFICERS, ORGANIZATION AND REGULATIONS

COUNTY OFFICERS COMPENSATION—CH. 61-461, LAWS OF FLORIDA; CH. 145, F. S.

To: Elmer O. Friday, Jr., County Judge, Fort Myers

QUESTION:

What is the effect of the provisions of Ch. 61-461 on the compensation of county officers whose compensation is fixed by local, special or general law of limited application (population act) enacted prior to or during 1961?

Chapter 61-461, known as the county officers' compensation law, amends Ch. 145, F. S., by adding new sections thereto and renumbering certain sections of said statutory chapter. Said Ch. 61-461, among other things, sets forth the maximum amount of compensation or salary, as the case may be, to be received by members of boards of county commissioners, members of county boards of public instruction, clerks of the circuit courts, county judges, sheriffs, superintendents of public instruction, supervisors of registration, tax assessors and tax collectors of the several counties of the state.

Section 3 of said Ch. 61-461 provides as follows:

Section 3. This chapter shall not be construed to repeal, affect or modify any local or special law, or general law of local application enacted prior to or during 1961 as to compensation of county officers, travel expenses of county officers, or payment of extra compensation to the chairman of any board of county commissioners or board of public instruction; provided, however, if any county officer's compensation prescribed herein is more than that provided in any local or special law, or general law of local application, this law shall control and be applicable. The provisions of this act shall not apply where in conflict with local laws applicable to Gadsden county, Liberty, Franklin and Wakulla counties passed at the 1961 or prior sessions of the legislature.

The above section is a clear pronouncement of the legislative intent that the provisions of local, special, or general laws of local application pertaining to the compensation of county officers, are not abrogated by Ch. 61-461, except where the amount of compensation provided by Ch. 61-461 exceeds the amount of compensation prescribed for any county officer by local, special or general law of local application.

It is my opinion that, where the compensation of county officers is provided by special, local or general law of limited application, passed prior to or during 1961, that unless the compensation provided by such act is less than the compensation prescribed by Ch. 61-461, such officers shall receive the amount of compensation prescribed by such local, special or general law of limited application.

061-151—September 25, 1961

COUNTY OFFICERS, ORGANIZATION, REGULATIONS
 COMPENSATION OF COUNTY OFFICERS—CH. 61-461, LAWS
 OF FLORIDA (CH. 145, F. S.); §§30.49, §193.02; CH.
 129, F. S.; §7, ART. V, §6, ART. VIII, STATE CONST.

To: Bryan Willis, State Auditor, Tallahassee

QUESTIONS:

If a county fee officer, with the concurrence of the board of county commissioners, elects to receive a salary and to pay over all of his fees to the board:

1. Does the officer operate like a sheriff under the budget system, requisition one-twelfth of his budget each month, and pay his salary and expenses therefrom?

2. If the answer to question 1 is in the negative,

a. Are the expenses of the office, including salaries of assistants, to be paid directly by the board of county commissioners?

b. If so, does the officer or the board control the nature and amount of the expenses of the office, including salaries and appointment of assistants?

c. If the board controls the expenses, should the board purchase the goods, materials and supplies that it deems necessary, and authorize in advance other expenses?

Chapter 61-461, enacted during the 1961 legislative session is intended "to provide for the compensation of the several county officers by this law of *general and uniform operation*." (§145.011(1), F. S.). The over-all effect of this act is two-fold; (1) to fix the maximum annual compensation to be paid to all salaried county officers and the maximum to be retained by all county *fee* officers listed therein, if the stated salary contained in said act is greater than is presently provided in any general, special or local law; and (2) to *guarantee* to the various county *fee* officers listed in said act a maximum annual compensation not to exceed the amount fixed therein, if such stated compensation contained in said act is greater than is presently provided in any general, special or local law.

One effect under (1) above is that all county officers receiving a stated annual salary under some other provision of the law would receive the salary stated in said chapter if such figure was greater than was previously provided under some other law; and under (2) above, all county *fee* officers listed in said chapter would be authorized to receive as their maximum annual compensation all the net income from their office not to exceed the amount stated in Ch. 61-461.

This brings us now to the second effect of Ch. 61-461, towards which your questions are more specifically directed. Under §145.011(4) (§1, Ch. 61-461), it is provided, in part, as follows:

Any board of county commissioners may, with the concurrence of any county officer receiving compensation from fees, by resolution *guarantee* and appropriate a salary in lieu of fees, provided that such salary shall not exceed the net income prescribed therein *and all fees collected*

by such officer are turned over to the board of county commissioners

When the resolution authorized by subsection (4), *supra*, is adopted by the board of county commissioners with the concurrence of the particular county fee officer, such officer will receive a fixed salary not to exceed the amount specified in the act for his office. The obvious purpose of subsection (4) above, is to *guarantee* to any of the county fee officers listed in said chapter a fixed annual compensation, regardless of the inadequacy of the fees and commissions of the office. In turn, all fees collected by said officer thereafter are required to be turned over to the board of county commissioners to be placed in the proper county fund.

Inasmuch as Ch. 61-461 fails to provide specifically the procedures to be followed for the payment of the expenses of the particular office, where the officer changes from the fee system to the salary system, it must be noted that the statutory and constitutional authority of the various county officers to control the operation of their offices dictates that said officials determine and expend the funds necessary for the proper operation of their office. The officials' authority to appoint deputies and employ persons to assist in the conduct of the public business must of necessity remain unimpaired.

It is important to state that the above comments contemplate a situation where a resolution is adopted under §145.011(4), F. S., guaranteeing a fee officer a stated annual salary and going no further. However, by the clear wording of §145.011(4), as cited above, the county commissioners and the county officer would decide all of these questions to wit: requisitioning expenses, control the nature and amount of expenses, salary of employees, etc., which would be reflected in the resolution adopted pursuant to said subsection.

We here deal with certain county officers, most of whom are within the purview of §6, Art. VIII, State Const., wherein it is provided that "their powers, duties and *compensation* shall be provided by law." A similar provision for the compensation of the county judge is contained in §7, Art. V, of the said constitution. There is no prohibition in the constitution against county officers being paid a salary from county funds. The legislature, by Ch. 61-461, amended Ch. 145, F. S., §145.011(4) of which as amended, provides that "any board of county commissioners may, with the concurrence of any county officer receiving compensation from fees, by resolution guarantee and appropriate a salary in lieu of fees, *provided that such salary shall not exceed the net income prescribed herein*, and all fees collected by such officer shall be turned over to the board of county commissioners" The reference to the "net income herein prescribed," as used in said §145.011(4), is rendered uncertain and ambiguous by the context of the amended statutes. The amount to be paid officers receiving a salary in lieu of compensation from fees of their office, although fixed by the board of county commissioners, may not exceed the net income prescribed herein; raises the question of whether that phrase limits the salary to that prescribed in and by §§145.031, et seq., F. S., or to the actual net income of the offices, but not to exceed the compensation, as to the county in question, as set out in said §145.031.

If we deem the salary to be paid to be limited not only by the compensation set out in §§145.031, et seq., but also by the net

income of the office, that is the difference between the fees received and the expenses of operating the office, then it becomes next to impossible for the boards of county commissioners to determine this additional limitation until the end of the year. This would be an unreasonable duty placed on the county commissioners, one not reasonably possible of being carried out. It would seem to lead to absurd and ridiculous consequences. Although the courts do not concern themselves with the wisdom of legislative enactments, they do try to avoid an interpretation which would produce unreasonable, absurd and ridiculous consequences, provided the language used is susceptible of an alternative interpretation (30 Fla. Jur. 220 and 221, §116; 82 C.J.S. 622 to 627, §326). We are of the view that the legislature, when it said that "such salary shall not exceed the net income prescribed herein," made reference to the "compensation" as stated in §§145.031, et seq., county by county, and not to the definition of "net income" in §145.021(2).

It is further noted that said §145.011(4) provides that when an officer is paid a salary in lieu of fees pursuant to said subsection that "all fees collected by such officer are turned over to the board of county commissioners." This seems to indicate an intention to channel such fees into the general revenue fund, or other proper fund of the county and to pay both the salary of the officer and the expenses of his office from said fund. As the salary fixed by the board of county commissioners is "with the concurrence of any (the) county officer" and by resolution, it is to be presumed that the salary fixed will be fixed with the full knowledge and consent of both the county commissioners and the officer. Unless the office expenses be paid from the general revenue, or other proper fund of the county, there would seem to be no other provision made for their payment. Doubtless the legislature intended that such expenses be paid from the fund into which the fees are payable when "turned over to the board of county commissioners, aforesaid." This would usually be the county general fund. These observations seem to answer question 1.

Although no express procedure is provided for the setting up of an office budget for the county officers coming under said §145.011(4), doubtless the legislature had in mind one similar to that provided by §9, Ch. 14678, 1931, relating to county officers' budgets thereunder, which section provided in part that: "the county budget commission may also fix and determine the amount to be paid or allowed by the county for the ensuing fiscal year by or for each and every county officer for salaries of employees and deputies and for supplies and other expenses of the conduct of his office." In *Cary v. State*, 138 Fla. 679, 190 So. 49, text 51, the court said that said statute was never intended to authorize the budget commission to fix the salaries and compensation to be paid the employees and deputies of the office, and the other office expenses, "but its purport is to authorize the budget commission to fix and determine the gross amount to be paid or allowed by the county" for the operation of the office. The sheriff's budgets provided for in §§30.49 et seq., F. S., are of a like nature. These laws and statutes seem to follow the same general pattern. Doubtless the legislature, when it amended Ch. 145, F. S., by Ch. 61-461, had a like or similar procedure in mind. In this connection we must also keep in mind the provisions of Ch. 129, F. S., regulating county budgets generally, and §193.02, F. S., relating to the office budgets of the county tax collector and assessor of taxes, which budgets

must be submitted to the state comptroller for approval. When an office comes under the salary provision of said §145.011(4), its officer ceases to be paid by fees and becomes a salaried officer, instead of a fee officer.

Doubtless the legislature had no intention of interfering with the independence of the county offices and officers, as to the operation and administration of their offices. This being true, we feel that budgets similar in their nature to those described in *Cary v. State*, supra, were intended. The county commissioners, when sitting as a county budget commission, where officers have been placed on a guaranteed salary pursuant to the above mentioned and described statutes, act as did the budget commission provided under the 1931 act involved in *Cary v. State*, supra. They are concerned only with the overall budget necessary for the proper operation of the office, and not the administration and other details of the office. Their main concern is the overall amount of the budget. The budget procedure provided in §§30.49, et seq., F. S., should be taken as an example for office budgets here considered, so far as the same is permitted under the applicable statutes and laws. We find no objection to the boards of county commissioners and the officers in question by mutual agreement settling most, if not all, of the questions arising in this connection.

I do not believe that the legislature intended to place any of the county fee officers referred to in said chapter under the sole and exclusive control of the board of county commissioners, nor did the legislature intend to relegate such county officials to the position of "an employee of the board of county commissioners." All that was intended by the passage of Ch. 61-461 was to elevate the financial structure of county officials' salaries and place such salary provisions in one chapter so that future modifications of such salaries would be simplified by way of amending that one chapter only.

In light of the above comments, your questions can best be answered as follows:

1. The county officer of necessity would be required to operate his office under a budget system in keeping with or similar to such system outlined in this opinion. Funds for the operation of the office and payment of the salary of the officer should be paid to the officer, on a monthly basis, in amounts not to exceed one-twelfth of funds budgeted by the county for those purposes.

2. In absence of a resolution containing agreements to the contrary:

- a. Funds for the payment of the reasonable and necessary expense of operation of the office will be paid to the county officer by the board of county commissioners and such officer will be responsible for the distribution and accounting of such funds. Substantial items of equipment necessary for the proper operation of the office are not, for the purpose of this opinion, considered within the operational expenses of the office and should be paid by the board of county commissioners in the same manner as for purchases of other county equipment. (See AGO 052-143, May 1, 1952, and 056-206, July 17, 1956.) All such expenditures, both operational and for substantial items of equipment for the office, must be made within the proper appropriation.

- b. The board of county commissioners would not control the nature and amount of the expenses of the office, except insofar as to the total amount budgeted by the county for the proper

operation of the office.

c. The county official would purchase whatever goods, supplies and materials he deems necessary for the proper operation of the office, except substantial items of equipment which may only be purchased by the officer with the approval of the board of county commissioners (AGO 052-143 and 056-206, *supra*); payment to be made from county funds budgeted for that purpose.

061-152—September 26, 1961

TAXATION

INTANGIBLE PERSONAL PROPERTY—STOCK ISSUED AND DELIVERED TO CREDITOR AS SECURITY—§§199.02, 199.08, 193.08, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

What is the tax situs of corporate stock issued by a Florida corporation to a nonresident person, firm or corporation, as security for a loan made to such nonresident, and delivered to him in his home state?

Shares of corporate stock, having a tax situs in this state, are classified, by §199.02, F. S., as class "B" intangible personal property, to be "assessed in the county where the taxpayer resides or has his usual domicile." Where such intangible personal property is held by a corporation it is made subject to taxation in the county where the corporation has its principal office or place of business (§199.08, F. S.). The above statutes are applicable only when the intangible personal property has a tax situs in this state, and has no application to such property having its taxable situs in another state, and no such situs in this state. Shares of corporate stock are the intangible personal property of their owner, ordinarily with their tax situs at the domicile of their owner (84 C. J. S. 256, §130). To the same effect see also *Starkey v. Carson*, 138 Fla. 301, 189 So. 385, text 388. This brings us to the question of the situs of the intangible personal property described in the above question, especially where issued and delivered to a person, firm or corporation in another state.

The shares of stock contemplated by the above question were issued by Florida corporations to a banking institution in another state, and delivered to such banking institution at its place of business in the other state; said certificates of stock having been issued and delivered for the purpose of securing the payment of a loan made by the said banking institution to the said Florida corporation or corporations. This was not a matter of endorsing or transferring of certificates of stock owned and held by the corporations in question; but was an original issue of their own corporate stock. On the face of the stock books and records of the said corporations this was an original issue of their shares of stock. From the records of the said corporation the banking institution of another state appears to be the owner and the holder of the corporate stock in question. The general rule is that shares of stock being intangible personal property, they are taxable to the holder thereof at the place of his domicile (84 C. J. S. 256, §130; 51 Am. Jur. 496 and 497, §487).

Subject to some contrary authority, the general rule is that a state has the authority, when authorizing the creation of corpora-

tions, to require the payment of taxes on all shares of corporate stock issued, whether owned by residents or nonresidents, and that a state may, by statute, assign a taxable situs in the state to the shares of a domestic corporation notwithstanding such shares are owned by a nonresident, at least where provision is made therein in creating the corporation, or the statute assigning the situs is in force when the corporation is organized (84 C. J. S. 256 and 257, §130; 51 Am. Jur. 501, §492; Ann. in 123 A. L. R. 189 - 194 and 139 A. L. R. 1463 - 1465). Section 193.08, F. S., provides in part that "the owner or holder of stock in any incorporated company doing business under corporate name shall not be taxed for such stock; provided, that such stock is returned for taxation by such incorporated company and taxes are paid thereon by such company . . ." In *Lewis State Bank v. Bridges*, 115 Fla. 784, 156 So. 144, the court held that this statute was permissive and not mandatory. It permits the corporation, in its discretion, to return and pay the taxes on stock issued by it in the hands of its stockholders. An assessment made by a municipality, without a return by the corporation, was held to be invalid. So far as we are advised we have no other and further statute in this connection.

In the absence of tax return by the corporation in question, the shares of stock issued to a nonresident and delivered to him at his domicile, is not subject to taxation in this state, if sufficient to vest title in said nonresident. If the transaction is insufficient to vest title in the persons named as stockholders, it would seem that title never passed from the corporation and the stock in question is not outstanding; in which case it would not be subject to taxation as an intangible. Although apparently not here necessary to an answer to the above stated question, upon the question of the validity of a pledge or mortgage of unissued stock by the corporation to secure its own obligations see 18 C. J. S. 646 and 647, §213; 13 Am. Jur. 834, §829; Ann. in 51 A. L. R. 1134 and 1135.

061-153—September 26, 1961

RETIREMENT

STATE AND COUNTY OFFICERS AND EMPLOYEES—PORT
AUTHORITIES—§122.02(1), F. S.—§15, ART. IX, STATE
CONST.—CH. 30946, 1955

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are port authorities in this state, established by the state legislature, their officers and employees, within the purview of the state and county officers and employees retirement system?

Florida's state and county officers and employees retirement system embraces "all full-time officers or employees who receive compensation for services rendered from state or county funds . . . or who receive compensation for employment or service from any agency, branch, department, institution or board of the state, or any county of the state, for services rendered the state or county from funds from any source provided for their employment or service regardless of whether the same is paid by state or county warrant or not . . ." (§122.02(1), F. S.). The officers and employees of most, if not all, port and similar authorities are paid from

funds of the authority and not from state or county funds; this seems to bring us to the question of whether port and similar authorities are agencies, branches, departments, institutions or boards of the state or of the county or counties wherein located.

Port authorities in this state seem to vary. Some like the Panama City port authority, are expressly declared to be an agency of the city wherein the port is located, for example the Panama City port authority (Ch. 23466, 1945). Other port authorities, such as the Liberty county port authority, (Ch. 30946, 1955) appear to be in fact agencies of the county wherein located. (See *Kirkland v. Phillips*, Fla., 106 So. 909). Others, such as the Port of New Orleans (*State v. Board of Comm.* 161 La. 361, 108 So. 770; *Miller v. Board of Comm.*, 199 La. 1071, 7 So. 2d 355), and the Port of New York (*Miller v. Port of New York Authority*, 18 N. J. Misc.—, 15 A. 2d 262) have been held to be state agencies. In *Buffalo and Port Erie Public Bridge Authority v. Davis*, 277 N. Y. 292, 14 N. E. 2d 74, the said authority was held to be a state agency, and in *Greensboro-High Point Airport Authority v. Johnson*, 226 N. C. 1, 36 S. E. 2d 803, the airport authority was held to be an agency of the state of North Carolina and of the cities of Greensboro and High Point, North Carolina, as well as of the county wherein located. In *Gardner v. Fuller*, 155 Fla. 833, 22 So. 2d 150, the Greater Miami port authority (Ch. 22303, Acts of 1943) was said to be a functionary, as distinguished from a department, of the city of Miami established to manage and control important functions of the municipal government of said city.

The 1955 legislature, by Ch. 30946, established the port authority of Liberty county, which act came before the court in *Kirkland v. Phillips*, Fla., 106 So. 2d 909, in which the court said that "our statute books are full of authorizing legislation establishing similar authorities for many Florida counties. These are taxing districts, hospital districts, drainage districts, and many other similar districts or such agencies of county government that have been created by local acts of the legislature. These cases sustain the notion that these agencies serve a useful and valid county function We have no difficulty, therefore, in reaching the conclusion that the functions authorized to be performed by the port authority for Liberty county were valid and proper county functions." The court further held that a legislative allocation of race track funds to the port authority of Liberty county was not a violation of §15, Art. IX, State Const., in that its use by the authority would be a use for a county purpose. It was held to be a "law allocating the use of these funds for a special county purpose in a particular county."

We are here directly interested in the status of the officers and employees of the Ocean highway and port authority, formerly the Fernandina port authority, under the state and county officers and employees retirement system. This authority was created and established, "in the county of Nassau, Florida," by Ch. 21418, 1941, which act has been amended from time to time, its name having been changed to Ocean highway and port authority by Ch. 27763, 1951. The authority was declared, by Ch. 21418 as amended by Ch. 24733, to "constitute a body politic and corporate and a political subdivision of the state of Florida" Said Ch. 21418, as amended by Ch. 26048, declared that "Fernandina port authority shall constitute a 'state public body' within the meaning and application of the housing cooperation law" Although ports

and harbors are used for intercourse and commerce between states and countries; between other ports and harbors of this country and other countries of the world, between this state and other states of the union, as well as between different ports of this state and other states, they are also used by the local people of the city, county or district. Ports like that of Jacksonville, Tampa, Miami, and other cities in this area and other states, serve not only the people of the local area but people of this state and other states. They serve a local, state and national purpose (See *Stockton v. Powell*, 29 Fla. 1, 10 So. 688).

"A state is possessed of the power to improve, within the state limits, waterways and harbors, except insofar as it is prohibited by federal legislation or constitutional provisions protecting the private property of riparian owners The power of municipal subdivisions of a state to make improvements depends on statutory authority. However, the power of the state to make improvements may be delegated to a city, or board" (65 C. J. S. 74, §12). "An incorporated port or port district is a public corporation which exercises some of the functions of government" (65 C. J. S. 76, §13). In *Visina v. Freeman*, 252 Minn. 177, 89 N. W. 635, text 646 and 647, the court said that "the right of a state to establish and maintain terminal port facilities is but an incident of its power to control its navigable waters It seems clear to us, therefore, that the purpose for which the port authority is established involves the establishment of an agency of the state for the administration of a purely governmental function." In *Sigman v. Brunswick Port Authority*, 214 Ga. 332, 104 S. E. 2d 467, text 471, the court said that "property used for the purpose of public convenience and welfare in the matter of public travel and transportation and to facilitate public transportation and, as a dock or port operation, to provide buildings which the users of the port may lease, and in which to store and process commodities transported by water, in aid of commerce, and for the promotion of public transportation, public commerce, and general welfare, and may properly be classified as public property. See also *Harrison v. Day*, 200 Va. 764, 107 S. E. 2d 594, text 601; *Port of New York Authority v. J. E. Linde Paper Co.*, 205 Misc. 110, 127 N. Y. S. 155, text 158; and *Commissioner of Internal Rev. v. Ten Eyck*, 2nd Cir., 76 Fed 2d 515, text 517 and 518.

The above authorities lead to the view that, unless otherwise specified in the statute creating it, a port or harbor authority, operating a port or harbor in this state, should be deemed a state agency when its port or harbor serves the state, or a large portion thereof; a county agency when it primarily serves a county area, and a municipal agency when it primarily serves a municipal area. But where port and harbor facilities are owned and operated by a county or a municipality, they should be deemed a facility, agency or department of the county or municipality as the case may be. Port and harbor facilities often serve large areas. Ports like the ports of New Orleans, New York, Jacksonville, and others serve many states. Other ports and harbors usually serve areas beyond the boundaries of the counties or municipalities where located. They differ from hospital and similar districts which primarily serve residents of the county or municipality where located. This answers the above stated question as well as the same may be answered generally.

As to the Ocean highway and port authority, formerly the Fernandina port authority, mentioned in your request for opinion,

when measured by the above and foregoing, it must be deemed either a state or a county agency, in either case it being within the purview of the state and county officers and employment retirement system.

061-154—September 27, 1961

DRIVERS LICENSES

EXPIRATION OF LICENSES—§322.18, F. S., AS AMENDED BY CH. 61-13, LAWS OF FLORIDA

To: *H. N. Kirkman, Director, Department of Public Safety, Tallahassee*

QUESTION:

Since September 30, 1961, falls on a Saturday and the county judge's office is closed on Saturday, will §322.18, F. S., automatically extend the expiration of the license until midnight Monday, October 2, 1961?

Your question, relating to §322.18, F. S., as amended by the 1961 legislature, concerns the fact that Sept. 30, 1961, falls on a Saturday and the statute as amended extends the validity of a license until midnight of the last day of the licensee's birth month "unless said date falls on a Sunday or a holiday, in which case the license shall expire on Monday or the day following the holiday."

Although the statute relates only to Sunday and holidays, it was obviously the intention of the legislature to authorize a licensee to obtain a license up to and including the last possible date and in the event the office was closed on that last date, then the first date of the following month would be available to him for procurement of driver's license without delinquent fee. It is noted that many county judges' offices remain open on Saturday, many close on Saturday by authority of special acts of the legislature and others close all day or one-half day on Saturday by local agreement between county officials.

It would appear, therefore, to be most reasonable and most practical and in keeping with the obvious intent of the legislature to authorize licensee to obtain driver's license on the Monday following Saturday, which is on the last day of the month.

Your question is therefore answered in the affirmative.

061-155—September 28, 1961

LICENSE TAXES

APPLICATION OF §§205.15, ET SEQ., F. S., TO LOCAL AND SPECIAL ACTS—§§205.15, 205.16, 205.161, F. S.—CH. 61-2234, LAWS OF FLORIDA, HIGHLANDS COUNTY

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are the exemption provisions of §205.15, et seq., F. S., applicable to license taxes imposed, in addition to a state tax, by local and special acts?

Said §§205.15, 205.16 and 205.161, F. S., provide exemptions from occupational license taxes, in whole or in part for cripples, invalids, widows, and persons over 65 years of age and disabled war veterans, within the purview of said sections. These statutes

permit persons within their purview to engage in any business, occupation or profession, for which an *occupational license tax* is required without obtaining a license or by paying a reduced license tax, as the case may be. These license tax exemptions do not apply to regulatory license fees, as distinguished from occupational license taxes. Impositions imposed on dealers in beverages, fish and game, etc., designed to regulate, instead of to provide revenue for the general operation of the state, are not within the purview of these sections of the statutes (Scott v. Worthington, 145 Fla. 461, 199 So. 766). Nowhere in said §§205.15, 205.16 and 205.161, is their application expressly limited to license taxes of general operation throughout the state.

Chapter 61-2234 is by its terms applicable to Highlands county only, and imposes upon "each member of the bar residing in Highlands county and engaged in the" practice of law an additional annual county occupational license tax in the sum of \$10. This is clearly designated by said act as an occupational license tax, in addition to the regular license taxes imposed by general law. The said act declares that this \$10 license tax "shall constitute and be considered as an integral part and portion of the county occupational tax payable in said county." The tax in question is allocated to a county fund to be used in establishing and maintaining a county law library. The reasons for granting cripples, invalids, widows, persons over 65 and disabled war veterans from the payment of license taxes imposed by general law seems just as applicable to like license taxes imposed by local and special acts for revenue purposes. We find nothing in Ch. 61-2234 declaring tax exemption statutes inapplicable thereto.

In the light of the above and foregoing, we feel that §§205.15, 205.16 and 205.161, F. S., are applicable to the \$10 library tax, "in addition to the annual county occupational license tax" imposed by Ch. 61-2234.

061-156—September 28, 1961

REGULATION OF PROFESSIONS AND VOCATIONS

FLORIDA BEAUTY CULTURE LAW—TEACHER REQUIREMENTS—§477.08, F. S.

To: *Mrs. Juanita W. Saunders, Executive Secretary State Board of Beauty Culture, Tallahassee*

QUESTION:

Under §477.08(6) (d), F. S., is a registered beautician who has had at least one year in a college, also required to have at least five years of experience as a practicing beautician before being allowed to take the examination for a certificate of registration to teach beauty culture?

Section 477.08 (6) F. S., prescribes the qualifications and requirements for an applicant to receive a certificate of registration to teach beauty culture, among which are those prescribed in paragraph (d) thereof; as follows:

...who was a registered, practicing beautician for at least five years, before being allowed to take the teachers' examination, *provided that persons who have had at least one year in a college are exempted from this requirement.* (Emphasis supplied.)

I wish to call your attention to the last paragraph of AGO 059-109, which states as follows:

... It is my opinion that the requirements a teacher must meet in applying for the original certificate of registration are set up by statute in §477.08 (6), F. S., and that the board cannot increase those qualifications.

In view of the foregoing it is my opinion that a registered beautician, who has at least one year of college is exempt from the five years of practical experience and should be admitted to the teachers examination, provided she meets the other requirements of §477.08 (6), F. S..

Your question is answered in the negative.

061-157—October 2, 1961

PUBLIC LANDS

CONSTRUCTION OF CH. 61-2427, LAWS OF FLORIDA, RELATING TO LIBERTY COUNTY, QUIETING TITLE TO CERTAIN LANDS—CHS. 16252, 1935; 17400, 1937; 18296, 1937, LAWS OF FLORIDA

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

What is the effect, if any, of chapter 61-2427 upon land titles in Liberty county, clouded or encumbered by Ch. 18296, 1937, known as the Murphy act?

Chapter 18296, 1937, also known and referred to as the Murphy act, provided that on June 9, 1939, "the fee simple title to all lands, against which there remains outstanding tax certificates which on the date this act becomes a law (June 9, 1937), are more than two years old, shall become absolutely vested in the state of Florida, and every right, title or interest of every nature or kind of former owners of said property, or anyone claiming by, through or under him, or anyone holding lien thereon shall cease and terminate and be at an end" Prior to the enactment of said Ch. 18296, 1937, the legislature had previously enacted Chs. 16252 and 17400, 1935 and 1937, known and referred to as the Futch acts, under which acts landowners paying their taxes for the years 1932, 1933, 1934, 1935 and 1936, or 1934, 1935, 1936, 1937 and 1938, were entitled to extension of their then delinquent taxes for 15 years. Many taxpayers, prior to the adoption of Ch. 18296, supra, by conforming to either chapter 16252 or 17400, supra, were entitled to the extension for the payment of delinquent taxes as aforesaid. The state, by Chs. 16252 and 17400, covenanted with its taxpayers, whose lands were encumbered by delinquent tax sale certificates, that, upon their paying taxes upon the lands so encumbered for a period of five years such delinquent taxes would be extended for 15 years.

Tax sale certificates brought under the Futch acts by the payment of five years of taxes were subsequently cancelled by Ch. 20981, 1941, now appearing as §193.04, F. S. Whether or not taxes were paid for five years in conformity with the said Futch acts became and was a matter of public record, the same being reflected by the tax rolls for the respective years, with the entries of the tax collector of payments made, which tax rolls were transmitted to the clerk of the circuit court to become records of that office. Sometimes taxes were assessed against the same lands in two or more entries in the tax roll; this is usually referred to as double taxation. One

of these assessments was void; the usual rule being that the payment of one of such assessments by the taxpayer rendered the other invalid, so that tax sale certificates issued upon the second assessment were invalid and in law constituted no lien upon the lands. Such double taxation is usually proven by reference to the two assessments, and by reference to the entry of the payment of one such assessment proof was obtained of the invalidity of the other. These observations point up the difficulties obtaining when records of a county are destroyed by fire or otherwise in proving the validity of tax liens and tax titles as well as what lands have been brought under the Futch acts and which have not.

The legislature, in its preamble to Ch. 61-2427 found, ascertained and declared that the county courthouse of Liberty county, burned in 1939 "destroying substantially all public records, including all original tax assessment rolls, all duplicate tax receipts, and most all other tax records . . . by reason of the burning of the courthouse . . . it is not possible to prove from the records of the county whether any parcel of land in the county was brought under the Futch acts, or not. Landowners cannot prove from the record that their lands were brought under the Futch acts; neither can the State prove that they were not brought under the said Futch acts." Other findings are made by the legislature, in and by its said preamble, evidencing the title difficulties, especially in connection with taxes and tax sale certificates, evidenced by landowners in Liberty county, because of the burning of the courthouse, as well as attorneys and abstractors dealing with such land titles.

It appears from the said preamble to Ch. 61-2427, that the legislature determined that, in order to clear titles to lands in Liberty county, that whatever title the state held on the effective date of said Ch. 61-2427 (May 22, 1961), which it acquired under the said Murphy act, should be transferred to and vested in "those persons, firms and corporations now in possession of and holding and claiming ownership of such lands," and that "the title to said lands is hereby quieted in such persons, firms and corporations against the state's claim thereto under the said Murphy act" This type of legislative procedure does not appear to be novel or new. See Chs. 6510, 6949, 12474, 18662 and 23125, 1913, 1915, 1927, 1937 and 1945, for examples, where the state's claim or apparent claim to the lands therein described was granted and transferred to persons claiming the lands and in possession thereof. The power of state legislatures is limited only by the state and federal constitution; in other words, the legislature is all powerful, except as limited by the state and federal constitutions (6 Fla. Jur. 367, §119; 50 Am. Jur. 61, §44; 82 C. J. S. 23, §9). We know of no constitutional provision prohibiting the granting of state property by the state for the purposes mentioned in said Ch. 61-2427.

Such legislation has been recognized in many cases (see 42 Am. Jur. 810, et seq., §§30, et seq.; 50 Am. Jur. 444, et seq., §424; 82 C. J. S. 936, et seq., §392). Congressional grants of land have been upheld (42 Am. Jur. 812, §32). The state legislature may itself by act convey state lands, or it may by general law make provision therefor (5A Thompson on Real Property, 1957 Replacement, 1126, §2720). The grant of the state's right, title and interest in lands in Liberty county, by said chapter 61-2427, appears to have been authorized and within the jurisdiction and power of the legislature.

The question of the authority of the legislature to enact said Ch. 61-2427 may arise, in that it relates to lands in Liberty county

only. The senate journal of 1961, on p. 886, reflects the introduction of the bill by Senator Tucker, together with the notation that "proof of publication of notice was attached to senate bill 786 (now Ch. 61-2427) when it was introduced in the senate, and evidence that such notice has been published was established by the senate, as required by §21, article III, of the constitution of the state of Florida." Even had there been no such notice there is respectable authority that an act disposing of state property is general and not special legislation (*State v. Stoutamire*, 131 Fla. 698, 179 So. 730, text 733). In *Coyle v. Smith*, 28 Okla. 121, 113 P. 944, text 945, an act locating the state capitol was held a general and not a local or special one. Acts authorizing suits against the state by certain persons were held general and not special or local laws in *Commonwealth v. Bowman*, 267 Ky. 58, 100 S. W. 2d 801, text 802, and *Cox v. State*, 134 Neb. 751, 279 N. W. 482, text 486.

We find nothing indicating any invalidity of said Ch. 61-2427, the evidence being clear that it is a valid and effective enactment of the legislature. The act is itself the conveyance and no further deed or conveyance by the trustees of the internal improvement fund, or other officer, board, commission or agency, is necessary to return the state's interest under the Murphy act "to those persons, firms and corporations now in possession of and holding and claiming ownership of such lands." Doubtless constructive possession is sufficient. This answers the above stated question.

061-158—October 2, 1961

PRISONERS

AUTHORITY OF SHERIFF OR JAILING AUTHORITIES TO CENSOR AND CONTROL PRISONER'S MAIL—§945.21, F. S.

To: P. A. B. Widener, Sheriff, West Palm Beach

QUESTION:

What authority does a sheriff have with regard to the censorship of mail of prisoners confined in his custody in the county jail?

The applicable provisions of the Florida Statutes relating to sheriffs and prisoners confined in county jails fail to give any indication with respect as to the authority of the sheriff to control and censor prisoner's mail. However, the legislature would appear to have established a general policy when it enacted §945.21, F. S., relating to the administration of the correctional system by the board of commissioners of state institutions. Section 945.21 provides as follows:

(1) The board is authorized to adopt and promulgate regulations governing the administration of the correctional system and the operation of the department. In addition to specific subjects otherwise provided for herein, regulations of the board may relate to:

* * *

(j) Mail to and from inmates; . . .

While the foregoing provision does not specifically apply to a sheriff in the administration of the county jail, nevertheless, it does reflect the legislative policy that incoming and outgoing mail of prisoners would be a proper subject of regulation by the prison authorities. (See AGO 054-78, 1953-54 biennial report of the attorney general, p. 772.)

An examination of the judicial decisions of this state indicates that this question has as yet not been decided by the courts of this state. However, the courts of our sister states and in particular the federal courts have had occasion to comment on this matter. In this regard, the U. S. Court of Appeal, 5th Circuit, in *Adams v. Ellis*, 197 F. 2d 483, stated that: "It is well recognized that prison authorities have the right of censorship of prisoners' mail."

It is further stated in 72 C. J. S., Prisons, §18 (c), at p. 873:

The prison authorities may properly regulate and control the mail of a prisoner, and the withholding of mail from a prisoner has been held purely a matter of prison regulation within the administrative discretion of the warden and not within the jurisdiction of the court. Furthermore, a requirement that outgoing letters from prisoners be censored by the prison authorities has been held valid, and the prison authorities may, in a proper case, refuse a prisoner permission to mail a letter, without interference by the courts. . .

(See also *Bailleaux v. Holmes*, 177 F. Supp. 361, 362; and *U. S. v. Randolph*, 161 F. Supp. 553, citing *Ortega v. Ragen*, 7 Cir., 216 F. 2d 561, certiorari denied 349 U. S. 940, 75 S. Ct. 786, 99 L. Ed. 1268; *Adams v. Ellis*, 5 Cir., 197 F. 2d 483; *Gerrish v. State of Maine*, D.C., 89 F. Supp. 244; *Green v. State of Maine*, D. C., 113 F. Supp. 253).

While the authority to censor incoming and outgoing mail has been recognized, as indicated above, the courts have further recognized the following limitation:

However, the right to inspect should not be used unnecessarily to delay communications to attorneys or the courts since such delay could amount to an effective denial of a prisoner's rights to access to the courts. . . (*Bailleaux v. Holmes* 177 F. Supp. 361, 362).

In light of the above statements it is my opinion that as an incident to the efficient administration of prisoners under his control, a sheriff would have the authority to *reasonably* regulate the outgoing and incoming mail of such prisoners and if necessary to censor such mail; bearing in mind that such regulation should not operate so as to delay or prevent freedom of communication by prisoners with the courts, executive officers, or counsel.

Your question is therefore answered accordingly.

061-159—October 3, 1961

Supplement—October 4, 1961
as to question 1.

COUNTY OFFICERS, ORGANIZATION, REGULATIONS COMPENSATION OF COUNTY FEE OFFICERS—CH. 61-461, LAWS OF FLORIDA (CH. 145, F. S.)

To: *Bryan Willis, State Auditor, Tallahassee*

QUESTIONS:

1. What is the effective date of an increase in the salary of members of the boards of county commissioners, boards of public instruction, sheriffs, superintendents of public instruction or supervisors of registration under the provisions of Ch. 61-461?

2. When a county fee officer, viz., clerk of the circuit court, county judge, tax assessor or tax collector, under the permissive provisions of Ch. 61-461 becomes a salaried county officer, when does the salary begin?

3. Is an increase in the annual compensation of a county fee officer under the provisions of Ch. 61-461, effective for the entire year or from July 1, 1961, the effective date of said chapter?

AS TO QUESTION 1:

Chapter 61-461, the county officers' salary law, extensively amends Ch. 145, F. S., A new section added to Ch. 145, viz., §145.021 (3), defines salary as stated remuneration to be paid in equal installments. The stated remuneration referred to obviously is the salary schedule set forth in Ch. 61-461 for the respective county officers referred to in question 1, *supra*.

The effective date of said chapter is July 1, 1961 (Ch. 61-461, §5).

It is my opinion that an increase in compensation of members of boards of county commissioners, boards of public instruction, sheriffs, superintendents of public instruction or supervisors of registration under the provisions of Ch. 61-461, is effective July 1, 1961, the effective date of the act. See *State ex rel. Bayless v. Lee*, 23 So. 2d 575, 156 Fla. 494.

AS TO QUESTION 2:

New §145.011 (4) confers on boards of county commissioners permissive authority to, with the concurrence of the officer involved, remove any county officer from the fee system and place such officer on a salary. When such a change in the compensation of a county fee officer occurs, it is my opinion that the effective date of the resolution of the board of county commissioners would be the effective date of the compensation change. See *State ex rel. Bayless v. Lee*, *supra*; AGO 061-151.

AS TO QUESTION 3:

Chapter 61-461 is, by §5 thereof, effective July 1, 1961. Careful examination of said chapter fails to reveal any provision which could be construed as dividing the annual compensation of a county fee officer into monthly increments.

In AGO 058-57 it was held that an increase in the annual compensation of a county fee officer was effective for the entire year in which the act authorizing such increase became effective, notwithstanding said act became effective in the middle of the year, when the act authorizing the increased compensation did not provide that the increased annual compensation be paid on a monthly basis.

It is my opinion that the increase in compensation of a county fee officer, as distinguished from a county salaried officer, or a fee officer who under permissive provisions of Ch. 61-461 becomes a salaried officer, is effective Jan. 1, 1961.

It is to be noted that §3 of Ch. 61-461 presents a declaration of legislative intent that said chapter shall not be construed to repeal, affect or modify local or special laws or general laws of local application enacted prior to or during 1961 as to the compensation of county officers, except that where a county officer's compensation as prescribed by Ch. 61-461 is greater in amount than such officer's compensation as provided by local, special or general laws of local application, said chapter shall control as to the amount of compensation.

061-160—October 3, 1961

TAXATION

DOCUMENTARY STAMP TAXES—LOANS THROUGH FARMERS HOME ADMINISTRATION—AGO 056-231—CHANGE EFFECTED BY PUBLIC LAW 87-128, FEDERAL AGRICULTURAL ACT, 1961

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Are Florida documentary stamp taxes payable on promissory notes or other written obligations to pay money to the U. S. through the farmers home administration?

By AGO 056-231, of Aug. 7, 1956, the above question was answered in the affirmative in so far as the maker of such notes or other obligations to pay money, but in the negative in so far as the U. S. is concerned. Subsequent to the rendering of said opinion, and on Aug. 8, 1961, public law 87-128 (75 Stat. 294), also known and designated as the federal agricultural act of 1961, was enacted and has become effective. Section 334 of said public law, in so far as here material, provides that "no tax shall be imposed or collected on or with respect to any instrument if the tax is based on:

(1) The value of any notes or mortgages or other lien instruments held by or transferred to the secretary;

(2) Any notes or lien instruments administered under this title which are made, assigned, or held by a person otherwise liable for such tax; or,

(3) The value of any property conveyed or transferred to the secretary;

whether as a tax on the instrument, the privilege of conveying or transferring or the recordation thereof; nor shall the failure to pay or collect any such tax be a ground for refusal to record or file such instruments, or for failure to impart notice, or prevent the enforcement of its provisions in any state or federal court."

There appears from the legislative history of said law (from senate report 642), a legislative intent that "no tax would be authorized on the notes or mortgages or other intangible property or on the privilege of transferring property other than the usual filing fees and *flat* fee documentary stamps." (Emphasis supplied.) Florida's documentary stamp statute is not a flat fee but a graduate fee tax.

There appears from said public law 87-128 and its legislative history an intention to exempt the documents mentioned in the above quotation from said law from state documentary stamp taxes, both as against the maker and the federal government as payee, and its agents.

In the light of these developments, the above question is answered in the negative, both as to the maker and the federal government and its agents. The answer to AGO 056-231, of Aug. 7, 1956, as to all documents made after the effective date of said public law 87-128, is changed to a negative one, both as to the maker and the federal government and its agents.

061-161—October 4, 1961

CRIMES
LOTTERIES—FOOTBALL SCORE CONTESTS

To: *Thomas E. Lee, Jr., Director, State Beverage Department, Tallahassee*

QUESTION:

Would the conduct of the following football score guessing contest constitute a lottery under the laws of this state?

STATEMENT OF FACT:

Entry blanks are furnished free of charge at places of business, there being no requirement that the person picking up a blank make any purchase. These blanks advertise a nationally known beer and are stamped with the name of the business establishment where they were obtained. There is a \$25 prize offered to "the person guessing the most winning teams" each week, and on the face of the entry blank are listed 27 games with spaces for the contestant to check the teams he thinks will win each game indicated. In addition, the contestant is to guess the score of the university of Florida game. The rules state that: "Entries must be in no later than Friday night at 12:00 midnight. Mail or take your pick hits to ... (the local radio station) ... In case of a tie, the one coming closest to the university of Florida's actual score wins."

A lottery contains three elements, viz., (1) a prize, (2) an award by chance and (3) a consideration.

The contest which you describe obviously contains a prize.

Undoubtedly, some judgment and skill are involved in forecasting the results of the football games listed in the entry blank. However, where chance predominates over skill and the contest is essentially a guessing contest, the element of chance which is essential to a lottery is present. (54 C.J.S., Lotteries, pp. 846-847, §2b (2)). Guessing contests are generally held to be lotteries. (54 C.J.S., Lotteries, p. 857, §10b). In AGO 059-197, Oct. 2, 1959; 057-310, Sept. 25, 1957; and 052-33, Feb. 1, 1952, this office held that in football score guessing contests similar to the one now under discussion the element of chance was present. In view of these opinions and C.J.S. references, it would appear that the requisite element of chance is present in the above described contest.

This leaves the question of consideration to be dealt with. In the three previously mentioned opinions of this office concerning football score contests, consideration was found to be present, and in each the particular contest was held to be an illegal lottery. Those opinions involved newspapers which published entry blanks which were to be clipped out, filled in and mailed to the sponsor. In the instant situation, contestants are to pick up blank forms at business establishments where they have been placed by the sponsoring beer distributor. In my opinion, either type of contest contains the element of consideration. In the former, consideration stems from the fact that the purchaser of the newspaper in return for the price paid for the paper is, in addition, purchasing a right to compete for the prize offered in the contest. Moreover, the inducement to the public to purchase the newspaper conducting the contest enhances the value of the business to its owner.

AGO 054-213, Sept. 1, 1954, although not dealing with football contests, points out that consideration is present in contests wherein the participant is required to obtain entry blanks from business establishments such as grocery stores, filling stations, drug stores, etc. We quote, in part, from that opinion:

Participants must expend time and make the effort to go to the place of business of a sponsoring merchant to obtain entry blanks.

* * * *

The time and effort of such persons, together with the benefits that concomitantly flow to the businesses of the sponsors as a result of such persons going to these places of business for the forms, constitutes a consideration for the chance to win a prize.

* * * *

Having people go to the sponsors' places of business is for the benefit of the sponsors, because it builds up their businesses and increases their sales. All, or substantially all, prospective participants are subjected to the sales appeal of the merchandise offered for sale at the places of business of the sponsors. When a person appears at such a place of business to secure an entry blank and become a participant in the hope of receiving a free prize, that person is made aware of the various commodities offered for sale there and he frequently makes a purchase, then or later, as the result of going there for an entry blank.

* * * *

And, as was said by the supreme court of Oklahoma in *Knox Industries Corp. v. State ex rel Scanland*, 258 P. 2d 910, in holding that a give-away scheme was a lottery where all that was necessary to qualify to win a prize was to go into any Knox service station or store and obtain a ticket, leaving the stub in a container, and where the expressed purpose of the enterprise was the creation of good will and the opportunity for advertisement of the Knox corporations' products:

"Admittedly defendants are not conducting a philanthropic endeavor. The expressed purpose of this enterprise is the creation of good will and the opportunity for advertisement of defendants' products and merchandise. The resultant benefits from the public good will must be recognized. The value of the advertising can neither be doubted nor minimized, since the general acceptability of defendants' products is made known thereby."

On the basis of the above, we must conclude that the contest which you describe constitutes a lottery and is therefore illegal under the laws of this state.

061-162—October 4, 1961

ELECTORS AND ELECTIONS

ABSENTEE REGISTRATION OF MILITARY PERSONNEL—
§§101.692-101.694, 101.62, F. S.

To: Tom Adams, Secretary of State, Tallahassee

QUESTIONS:

1. May supervisors of registration accept applica-

tions for absentee registration prior to 45 days preceding an election?

2. May supervisors of registration register those persons applying to register by absentee during the period when the registration books are normally closed?

AS TO QUESTION 1:

Sections 101.692-101.694, F. S., as amended by Ch. 59-217, make no reference to registration during the period preceding 45 days prior to an election which is, under the provisions of §101.62, F. S., the earliest day which an elector may receive an absentee ballot. This 45 day figure is again referred to in §101.694, F. S., but again the reference is to the mailing of absentee ballots and does not pertain to absentee registration.

Accordingly, this office is inclined toward the position that a supervisor of registration may accept an application for absentee registration and officially enter the applicant's name upon the registration books at a time more than 45 days prior to an election the same as said officer would register any other elector during that time so long as the application is in order and the books are open for registration.

Question 1 is therefore answered in the affirmative.

AS TO QUESTION 2:

Chapter 59-217, amending §§101.692, 101.693 and 101.694, F. S., makes no reference to the times during which absentee registration is to be permitted nor does it contain any specific authority permitting initial registration during a time when the registration books are closed. While §101.692 (3), F. S., permits reinstatement or re-registration of a previously registered elector at a time when the books are closed, if he falls within that category of persons defined in §101.692, F. S., this section does not authorize the initial registration of those or any other persons during a time when the registration books are closed. In AGO 058-100, p. 603 of the 1957-58 biennial report of the attorney general, this office indicated that:

It would appear that little effect would be given to the provisions of the law requiring the registration books to close and prohibiting registration except during the time provided therefor if certain electors were allowed to register and reregister during the period when the books are required by law to be closed. I find no authority in the election code providing for registration during the time when the registration books are required by law to be closed. In 1884, the Florida supreme court held in *State v. Sumter County Commissioners*, 20 Fla. 859, that a registration of voters made at a time, or in another manner, than that prescribed by statute, is not a legal registration. It appears that this well established precedent is still in effect.

See also the answer to question 3 of AGO 058-79, 1957-58 biennial report of the attorney general, p. 573 at 574, and opinion 052-140, p. 108 of the 1951-52 biennial report of the attorney general. Your attention is further directed to AGO 052-68 p. 96 of the 1951-52 biennial report, substantiating the position previously taken by this office on March 29, 1960, that registration books may not be reopened to permit the registration of those persons who become 21 years of age prior to an election but subsequent to the time the books close for that election.

Since there is no specific provision permitting absentee registration during a period when the books are closed, this office would, on the basis of these authorities and comments, be inclined toward the position that absentee registration at a time when the registration books are closed is not permitted and, accordingly, question 2 is answered in the negative.

In connection with this situation this office would, as a practical matter, suggest that should a supervisor of registration receive a proper application for absentee registration at a time when the books are closed that rather than return said application to the applicant with the notation that it cannot be accepted because the books are closed, it would be a better procedure for the supervisor of registration to hold said application in abeyance and enter it upon the registration books at such time as they may re-open.

061-163—October 4, 1961

**BEAUTY CULTURE LAW
REQUIREMENTS, BEAUTY CULTURE SCHOOL—EMPLOY-
MENT OF LICENSED PHYSICIAN—REQUIRED SUB-
JECTS—§477.08, 477.05, F. S.**

*To: Juanita W. Saunders, Executive Secretary, State Board of
Beauty Culture, Tallahassee*

QUESTIONS:

1. Does §477.08(1), F. S., require that prior to approval and issuance of a certificate of registration to operate a school of beauty culture that the owner of such school shall provide for one of the members of the faculty to be a licensed physician?

2. If so, can the Florida board of beauty culture adopt a rule which will require the licensed physician member of a school faculty to lecture, (or give instruction) for a minimum of four hours per month during the minimum period of seven months required by statute to complete the beauty culture course, on the following subjects, required to be taught by §477.08: physiology, hygiene and elementary chemistry relating to sterilization and antiseptics, massaging and manipulating the muscles of the face, neck to scalp, treatments of the face and scalp with antiseptics or other preparations, and removing superfluous hair from the body with a chemical preparation or by use of any other devices or appliances, except by light waves and electrolysis?

Section 477.08, F. S., provides the requirements that the owners of schools of beauty culture shall meet prior to receiving a certificate of registration or approval by the board to operate such a school. Section 477.08(1) requires, among other things, that *no school of beauty culture shall be approved by the board unless its teachers or faculty are registered under chapter 477, "one of whom shall be a licensed physician."* (Schools operated as a part of the public school system are exempt from the foregoing provisions of Ch. 477).

Chapter 16800, 1935, which created the first state board of beauty culture examiners, provided in §7 of said act, substantially the same requirement as contained in §477.08(1), *supra*.

Pursuant to said Ch. 16800, *supra*, the board adopted the first rules and regulations governing schools of beauty culture and the

teaching and instructional staff.

The pertinent provision of said rules as they relate to your question are as follows:

On p. 6, under the heading, Teaching and Instructional Staff, the first paragraph thereof provides that "All teachers and instructors in a school of beauty culture, *except physicians*, must hold a certificate of registration ... as a beauty culture teacher issued, by the board."

In other words, the board took the position that *the licensed physician member of the faculty is not required to be a registered teacher of beauty culture*. I agree with that construction of the statute. (See exemptions §477.05(1) F. S.)

On p. 9, fifth paragraph of the aforesaid rules, we quote as follows:

Each school of beauty culture is required to have attached to its staff a Florida licensed doctor of medicine *who shall lecture at least once a month on sanitation; skin and scalp diseases and personal hygiene*.

When an attack was made upon certain provisions of the first rules adopted by the board and approved by the state board of health, in Gillett et al., constituting State Board of Beauty Culture Examiners v. Florida Univ. of Dermatology, 197 So. 852, the supreme court of Florida upheld the validity of two of the aforesaid rules; to-wit: *the rule relative to the number of instructors required for a certain number of students*; and the rule that required all persons desiring to operate a school of beauty culture to make application for a permit on a form furnished by the board and shall show by said application that they have met all "requirements of law" and "the requirements of the board."

From an examination of the records in the office of the secretary of state, it appears that the first rules of the board were revised on June 10, 1954; May 18, 1956; Jan. 30, 1958; and May 25, 1959.

In view of the foregoing it is my opinion that §477.08(1), F. S., requires that *a licensed physician shall be a member of the faculty of a school of beauty culture*.

It is also my opinion that the board may adopt a rule which will require the licensed physician member of the faculty to lecture or give instruction for a specified number of hours on the list of subjects required to be taught under §477.08(1), such as physiology, hygiene and elementary chemistry relating to sterilization and antiseptics, massaging and manipulating the muscles of the face, neck to scalp, treatments of the face and scalp with antiseptics or other preparations, and removing superfluous hair from the body with a chemical preparation or by use of any other devices or appliances, except by light waves and electrolysis; or such other subjects as may be added or substituted by the board pursuant to the provisions of §477.08(5).

Even though it appears that for several years past the board has ignored the requirements of §477.08(1), relative to a licensed physician's being a member of the faculty in a school of beauty culture, "the fact that unlawful, unfair or other improper practices are of long standing does not require their sanction or prohibit their abolishment by a regulatory board or commission." (See 73 C.J.S. 368.)

It is the duty of every officer, board or commission to obey the laws which prescribe the duties of his or its office. Such public officers shall comply with the provisions of such laws until they are either repealed by the legislature or until they are declared un-

constitutional in a proper judicial proceeding. (See 43 Am. Jur. 272, p 84).

It is the duty of the Florida state board of beauty culture to require that all the provisions of Ch. 477 (including §477.08(1)) and the rules and regulations of the board adopted pursuant thereto are fully complied with prior to issuing any certificate of registration under said Ch. 477. Although the board may not make a rule that is contrary to the expressed or implied provisions of the statutes, it may adopt an administrative rule or regulation which may interpret or implement the law which it has the legal responsibility and duty to administer and enforce (See 73 C. J. S. 394, 433).

In view of the foregoing, it is my opinion that both of your questions should be answered in the affirmative.

061-164—October 9, 1961

LICENSE TAXES
STAND OR DRIVE-IN EATING ESTABLISHMENTS—CLASSIFICATION—§205.34, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Under what section or sections of the Florida Statutes should eating establishments serving meals and food products to customers, be licensed when such eating establishments maintain no seats or similar accommodations for its customers?

We are here concerned with so-called concession stands, drive-ins, and other establishments serving meals and food products to customers, without providing seats or similar facilities for their convenience, where such customers eat sitting in cars or standing. Cafes, restaurants and other eating places, are usually licensed under §205.34, F. S., their license taxes being based upon the seats or other accommodations furnished. We seem here to be concerned with the construction of the phrase "seats or accommodations for the service of food," as used in said section. The license taxes under this section are based upon the number of seats or accommodations furnished "for the service of food at any one time." Where chairs, stools, or the like are furnished, the seating capacity may be ascertained merely by counting the number of such seating accommodations. This seems to be included within the term "seats," as used in the above statutes. However, the license tax is determined from the number of seats or accommodations for the service of food.

The word "accommodation" is defined by Webster as "provision for what is needed or desirable for convenience Whatever supplies a want, or affords ease, refreshment or convenience. . . . Anything furnished which is desired or needful." It is also defined in 1 C. J. S. 458, as anything for use or convenience, as "accommodations at a public house." In the statutes, the term "accommodations" follows the word "seats," which raises the question of the application of the effect of the association of the two words (82 C. J. S. 654, §331), sometimes referred to as the rule of *noscitur a sociis*, and the doctrine of *eiusdem generis* (82 C. J. S. 658, §332). Under these rules the term "accommodations" takes color from the term "seats" with which it is associated, and should

be deemed a word of the general nature or class as is the term "seats." "Accommodations" as used in said §205.34, has reference to the spaces or areas reserved as accommodations for the purpose of serving food. In the case of a drive-in restaurant, spaces are provided for the parking of automobiles where the occupants thereof are served food ordered by them. These spaces are usually marked off, one for each automobile whose occupants seek the service of the restaurant. Although most serving counters maintained by restaurants as accommodations for their customers are provided with stools, others maintain no stools but serve their customers while standing at such counters. These counters are accommodations within the purview of said §205.34. Each such counter should be divided into reasonable serving spaces for the purpose of determining the license tax to be imposed under said section.

Even where no seating arrangements are provided, and no counter standing space is provided, there may nevertheless be accommodations provided for customers. For example, where standing room is provided as accommodation for its customers by a restaurant, such accommodation is within the purview of said §205.34, which, for the purpose of determining the number of accommodations, may be divided into spaces of sufficient size for customer convenience. Therefore, eating establishments serving meals and food products to customers, but maintaining no seats or similar accommodations for customers, should be licensed under §205.34, F. S. Where seats are maintained by a restaurant as accommodations for its customers, and no other accommodations are maintained, the number of seats determines the license tax to be collected. However, where a restaurant maintains other accommodations for its customers, instead of seats, the areas maintained should be divided into serving or parking spaces. Where vehicle parking spaces are maintained, the average number of persons served per vehicle should be determined, in such manner as the comptroller may determine, and the number of parking spaces multiplied by such number determined will give the number of accommodations to be used for the purposes of determining license taxes. Where seating, standing, parking, and other types of accommodations are maintained by a restaurant, they should be combined for the purpose of determining the license taxes due.

061-165—October 9, 1961

ELECTORS AND ELECTIONS

USE OF PRINTER TYPE VOTING MACHINES—CONSTRUCTION OF §§101.45 and 104.54, F. S.

To: *Fleming H. Bowden, Supervisor of Registration, Jacksonville*
QUESTION:

Would it be permissible in the light of §§101.45 and 101.54, F. S., to utilize a voting machine which furnishes the election board at the polls permanent information before and after an election reflecting the position of the counters in the voting machine counter compartment by rolling a carboned paper over said counters when the board is denied actual physical access to the back of the voting machine and the counters?

As I understand from your letter and the information and

material recently left in this office by your assistant supervisor of registration, the machine about which you inquire is known as the printer type voting machine manufactured by Automatic Voting Machine Co. I also understand that only two companies in America manufacture voting machines and each has offered a reputable product at a competitive price for a number of years. In this instance the machine under discussion has been offered to voting officials as an improvement by one of these two companies.

The information about this particular machine furnished to this office reveals the counters can be set and the machine prepared by the authorized voting machine custodian at the voting machine storage location prior to the election. The machine is then locked and sealed. When the machine is delivered to the polling place the election board records the number of the seal, then breaks the seal which gives access to a key which unlocks a compartment containing a crank. This crank when turned as directed will roll a large piece of specially prepared carbon paper over the counters dropping the paper out of the machine. In rolling the paper over the counters the position of each counter is revealed and printed in retainable form. Although actual physical access to the counters by the election board is not possible, the board may inspect and retain the paper which has been rolled over the counters and which reveals each counter position along with not only the candidate's key number but the candidate's name and office as well. The paper may then be inspected before the polls are open to determine if all counters are set at zero and should it be revealed that a particular counter or counters is or are not properly set at zero then a notation of the figure shown and the candidate in whose column the irregular counter setting is found may be noted by the election board.

The machine is then ready for use by the electors, after which the machine can be sealed at the polls by the election board, and the same crank referred to earlier can be turned in the opposite direction rolling the remaining paper contained in the machine over the counters so as to reflect their position after the voting. There is, however, only enough paper in the machine to complete one election so any attempt to take the recording paper out of the machine before the ballots were cast would immediately render the machine inoperative for further balloting hence any attempt to commit this type of fraudulent procedure would be immediately revealed. Several copies of the second sheet are produced so that there are ample copies for the inspectors, the press and anyone else who might have a need for the information as to the outcome of the election. The machine which has been sealed at the polls can then be returned to its usual storage location and in the event there is a contest of election the candidates, interested election officials, and others may go to the voting machine storage location to inspect the machine or machines involved at which time the seal can be broken and through use of an additional key not furnished to the election board for use at the polls, the back of the machine may then be opened so as to reveal the actual counters for inspection.

According to the information received here, this machine accomplishes three things machines currently in use do not accomplish. First it provides a permanent written record of the counter positions, both before and after the election. Second, it obviates the necessity for persons unfamiliar with the mechanics of voting machines to go into the back of the machine for any purpose which

lessens the chance of mechanical error. Third, it obviates the necessity of manually transcribing the figures shown on the counters, after the election. By eliminating the latter step the possibility of human error in the transcription is eliminated and a permanent record of the counter positions, both before and after the election is immediately available. Unquestionably this machine appears to be an improvement over older models and further we are advised the printer device discussed herein can be adapted to many machines now in use which is another feature in its favor.

The question presented herein relates to the legality of the use of this type machine in the light of §§101.45 and 101.54, F. S., which provide in part:

If the numbers are found to agree with those on the envelope, *the election officer shall proceed to open the doors concealing the counters and each officer shall carefully examine every counter* and see that it registers zero (000), and same is subject to the inspection of official watchers. (§101.45, F. S.)

The inspectors then shall open the counting compartments in the presence of the watchers and all other persons who may be lawfully within the polling place, *giving full view of all the counter numbers.* The clerk of the board of elections shall then read and announce in distinct tones the designating number and letter on each counter for each candidate's name, the result as shown by the counter numbers, ... (§101.54, F. S.) (Emphasis supplied.)

It would appear from the text of the provisions just quoted that the statute contemplates that the inspectors should be able to open the back doors of the voting machines so as to be able to examine the counters and ascertain that each is set at zero before the election and ascertain the votes cast for each candidate after the election. From the description of the machine contemplated herein as set out above, it is readily apparent that there is no need for the inspection board "to open the doors concealing the counters" before or after an election to ascertain the position of said counters. It should, however, be borne in mind that the printer type machine described herein was not on the market in 1951 when §101.45 and 101.54, F. S., were enacted nor is there any evidence that the development of such a machine was contemplated by the legislature at that time.

The fundamental rule, to which all other rules are subordinate, in construction of statutes is that intent thereof is law, and should be duly ascertained and effectuated for in statutory construction, legislative intent is the pole star by which the court must be guided, and such intent must be given effect even though it may appear to contradict the strict letter of the statute and well-settled canons of construction (*Smith v. Ryan, Fla.*, 39 So. 2d 281, *Ervin v. Peninsular Tel. Co., Fla.*, 53 So. 2d. 647, and *American Bakeries Co. v. Haines City*, 131 Fla. 790, 180 So. 524).

In this instance, this office is inclined toward the position that the primary intent of the legislature was not to provide for the physical inspection of the inner workings and hidden mechanisms of the voting machine but rather the intent was to insure that the election officials could inspect the voting machines to insure that the votes cast for each candidate could be determined accurately and in a manner to insure the integrity and purity of the ballot. In

this regard the Florida supreme court has said the "purpose and intent of a legislative act should be construed so as to fairly and liberally accomplish the beneficial purpose for which it was adopted and all intendments favored towards its validity rather than apply a rule of strictness which defeats and makes meaningless fundamentals of legislative power." *Hanson v. State*, Fla. 56 So. 2d 129. In construing and applying a statute, the court must be guided by the language used, subject regulated, *purpose to be accomplished* and means adopted for accomplishment of such purpose, in order to determine true and objective intent of legislature (*Wallace Corp. v. Overstreet*, Fla. 99 So. 2d 626, *Tyree v. Hyde*, 60 Fla. 389, 52 So. 968). Intent of a valid statute is the law, and it is ascertained by consideration of language and purpose of the enactment (*Watson v. Holland*, 20 So. 2d 388, 155 Fla. 342, motion denied 65 S. Ct. 1408, 325 U. S. 839, 89 L. Ed. 1965). It is the province of courts to interpret and apply statutes so as to effectuate lawmaking intent (*Broward v. Broward*, 117 So. 691, 96 Fla. 131). In construing acts of legislature, courts must ascertain legislative intent and give provisions of the act a field of operation to harmonize with such intent. (*State ex rel Landis v. Crume*, 180 So. 38, 131 Fla. 848). In further setting out acceptable rules for statutory construction, the Florida supreme court has stated that though the general rule of statutory construction is that the intent of the legislature is to be found in the language used *if, however, from a view of the whole law or other laws in pari materia, the evident intention is different from the literal import of the language used, that intention should prevail, and real intent of legislature, when ascertained will always prevail over literal sense of language used in statute* (*Curry v. Lehman*, 47 So. 18, 55 Fla. 847, *State v. Johnson*, 72 So. 477, 71 Fla. 363). Statutes must be construed to effect the evident legislative intent, *even if the result seems contradictory to rules of construction and the strict letter of the statute, and particularly when a construction based upon the strict letter of the statute would lead to an unintended result that defeats the evident legislative purpose* (*Payne v. Payne*, 89 So. 538, 82 Fla. 219; and *Beebe v. Richardson*, 23 So. 2d 718, 156 Fla. 559; *State v. Sullivan*, 116 So. 255, 95 Fla. 191; and *State ex rel Hughes v. Wentworth*, 185 So. 357, 135 Fla. 565). In construing a statute, the court will consider its history, evil to be corrected, intention of legislature, subject to be regulated, objects to be obtained and will be guided by legislative intent *even though intent may apparently contradict the strict letter of statute* (*Singleton v. Larson*, 46 So. 186; *Knight & Wall Co. v. Tampa Sand Lime Brick Co.*, 46 So. 2d 285, 55 Fla. 728). The primary purpose designated in a statute should determine the force and effect of the words used in the statute, and no literal interpretation should be given that leads to an unreasonable or ridiculous conclusion or a purpose not designated by the lawmakers (*Smith v. Ryan*, 39 So. 2d 281). If the language of particular part of a statute imports intent which leads to absurdity or to evil result, *the strict letter of the law might be required to yield to the obvious legislative intent* (*Foley v. State ex rel Gordon*, Fla., 50 So. 2d 179). If any other construction is possible, courts should not construe statute in such a manner that an absurd conclusion may be reached (*State Dept. of Public Welfare v. Bland*, Fla., 66 So. 2d 59, and *Johnson v. State*, Fla., 91 So. 2d 185). There is strong presumption against absurdity in statutory provisions and, if the language used is susceptible of two senses, the sense not leading to

absurd consequences will be adopted by court (Haworth v. Chapman, 152 So. 663, 113 Fla. 591. Simmons v. State, 36 So. 2d 207, 160 Fla. 626). *The function of statutory construction is to further and not to defeat the purpose of legislation* (State ex rel Himes v. Culbreath, 174 So. 422, 128 Fla. 210). A statute should be construed to make it effective to advance and not defeat the object, if the language permits (State v. Rose, 122 So. 225, 97 Fla. 710). We are here trying to follow these generally accepted rules of statutory construction which indicate in substance that legislative intent should be ascertained in construing all statutes and when ascertained such intent should be given effect so as to liberally accomplish the beneficial purpose for which it was created even if the result may seem contradictory to the strict letter of the statute so long as the purpose for which the statute was enacted can be accomplished in a manner which will avoid an absurd result or application of the statute or statutes under consideration.

In this instance this office is inclined toward the position that it was not the intent of the legislature that the election officials actually inspect each counter in the back of the voting machines but rather it was the legislative intent that the election officials ascertain in accurate fashion the position of these counters and even though such an interpretation might not seem to follow the strict letter of the statute the courts as pointed out above have held that the strict letter need not be followed where an absurd result would be reached. Certainly the law was not intended to thwart an improvement which would not only furnish the required information but furnish it in a permanent form both before and after the election, for recordation where necessary, all information as to the position of the counters, and in addition thereto, provide a method of sealing the machine at the polls so the actual counters might later be inspected in the event of an election contest.

There appears to be no question that the primary intent of the statutes under consideration was to preserve in every way possible the purity and integrity and *accuracy* of the ballot and to outlaw an improvement which would eliminate the necessity of manually writing down the numbers shown on the counters after the election (See §101.54, F. S.), and thereby eliminate the possibility of human error in transcription would be an absurd result and hence a result frowned on under the accepted rules of statutory construction referred to herein.

Accordingly, since it appears that the machine in question provides the election board with an accurate and reliable record of the position of the counters at the times they must be inspected under the provisions of §§101.45 and 101.54, F. S., and since the actual counters may later be inspected, if necessary, this office is inclined toward the position that the machine in question meets the intended requirements of the law and therefore your question as set out above, insofar as it is applicable to the machine discussed therein is answered in the affirmative.

061-166—October 9, 1961

PUBLIC RECORDS

NOTATION OF INTANGIBLE TAX ON RECORD OF MORTGAGE FOR FUTURE ADVANCES—§§199.11 (5) (c), 696.05 AND 697.04, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Where the clerk of the circuit court records instruments filed for record by miniature photographic, microfilming or microphotographic process, how may the clerk note the payment of additional intangible taxes on advances under a mortgage for future advances?

The lien of a mortgage for future advances is valid as to all indebtedness secured by such mortgage. Future advances secured by such mortgage are valid "from the time the mortgage or other instrument is filed for record as provided by law." (§697.04 (1), F. S.)

The amount of the lien is limited to the amount of advances made under such mortgage within 20 years from the date of such mortgage or other instrument (§697.04 (2), F. S.).

The tax collector or clerk is required to place a notation showing the amount of intangible tax received by him on the record, deed of trust, or other instrument evidencing the lien of a mortgage for future advances or in the alternative upon any supplemental instrument evidencing an advance under a mortgage for future advances which is offered for recording. "... Failure to pay the tax shall not affect the lien for any such future advance given by §697.04, but any person who shall fail or refuse to pay such tax due by him shall be guilty of a misdemeanor, and upon conviction shall be fined accordingly. The mortgage, deed of trust, or other instrument shall not be enforceable in any court of this state as to any such advance unless and until the tax due thereon each advance that may have been made thereunder has been paid." (§199.11 (5) (c))

Section 696.05 authorizes the clerk of the circuit court to record any and all instruments filed for record by miniature photographic, microfilming or microphotographic process or any other photographic, mechanical or other process. Said section requires that where the microfilm or other microphotographic processes are used for the recording of instruments that suitable viewing equipment be provided so that such records shall be readily available for public inspection and copying. Obviously, this requires proper indexing of microfilmed records.

From a legislative history of §696.05, it appears that recording by photographic processes has been authorized in this state since 1925 and that the legislature recognized the advantages of the use of microfilm processes by authorizing the original recordation of instruments by such process in 1959. It is common knowledge that many Florida counties are now so recording instruments.

Where recording is done by the microfilm process it is a practical impossibility for a notation of the payment of intangible taxes on advances under a mortgage for future advances to be made on the microfilmed record. The lien created by a mortgage for future advances under the provisions of §697.04, F. S., is not dissolved or affected by the failure of the record of a mort-

gage for future advances to reflect payment of the intangible tax on additional advances under such a mortgage. Rather does it appear that the purpose of §199.11 (5) (c) in requiring the clerk to make such notation on the record is to provide a means of determining whether a tax on such advances has been paid. There is serious doubt that the notation of the payment of additional intangible taxes on the original record of a mortgage for future advances could be considered by a court of competent jurisdiction proof that the advance for which such additional intangible taxes were paid had actually been made to the mortgagor.

It is to be noted that said section recognizes that supplemental instruments relating to advances under such a mortgage may be recorded and that the notation of the payment of the intangible tax may be made on such instruments.

It appears to me that since the purpose of §199.11(5)(c) is to provide a means of determining whether intangible taxes on advances under a mortgage for future advances have been paid, that you as comptroller, having plenary jurisdiction over state intangible taxes, would be authorized to permit clerks recording by microfilm and other miniature photographic processes to issue pre-numbered receipts for the payment of additional intangible taxes on advances made under mortgages for future advances.

It is my opinion that when the recording of instruments is done by the microfilm process or any other authorized photographic process which makes it impossible for the clerk to note the payment of intangible taxes on an advance under a mortgage for future advances on the record of such mortgage, the clerk would, with permission of the comptroller, be authorized to issue a pre-numbered receipt for the payment of such taxes if no supplemental instrument relating to such advances is recorded. If a supplemental instrument relating to such advances is offered for recording, the clerk should, in addition to the pre-numbered receipt, note the payment of the additional intangible tax on the supplemental instrument record.

061-167—October 16, 1961

TAXATION

TAXABLE INTERESTS—EASEMENTS, LEASEHOLDS,
OTHER INTERESTS—§§193.22, 193.221,
192.58, 192.62, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. What easements, leaseholds, and other interests in lands in this state, if any, are subject to separate taxation?
2. Are public utility easements, leaseholds, etc., subject to separate taxation in this state?
3. Are long term leases, easements, etc., subject to separate taxation in this state, including partial interests therein granted by the owner or holder of the said lease, easement, etc.?

"Under Florida taxing statutes the levy and assessment is on the realty itself, at its full cash value, regardless of the existence of estates in it," unless otherwise provided by statute (Bancroft Inv. Corp. v. Jacksonville, 157 Fla. 546, 27 So. 2d 162, text 167; Wolfson v. Heins, 149 Fla. 499, 6 So. 2d 858, text 860 and 861).

It is stated in 84 C. J. S. 186, §75, that "incorporeal hereditaments, easements, and other rights in land, as distinguished from the ownership of the soil, may possess value and are therefore taxable *if the legislature so determines, but not otherwise.*" This rule was followed, as to leasehold interests in governmental tax exempt properties, in *Park-N-shop, Inc., v. Sparkman, Fla.*, 99 So. 2d 571; *Patrick Gardens, Inc., v. Nash, Fla.*, 100 So. 2d 626; and *Ill. Grain Corp. v. Schleman, Fla. App.*, 114 So. 2d 307, text 310. In this state easements, leaseholds and other separate interests in land in this state are subject to separate taxation only when authorized or required by statute or constitutional provision; in the absence of such statutes the realty in question, except where exempt from taxation, is subject to taxation at its full cash value regardless of the easements, leaseholds, and other interests in, to or encumbering such realty. Easements, leaseholds and other interests in land may be separately taxed only when such separate taxation is expressly authorized by statute.

Section 193.22, F. S., makes provision for the separate assessment of timber and turpentine rights when owned and held separately from the ownership of the real property itself. Chapter 57-150, which became §193.221, F. S., purports to authorize the separate taxation of mineral, oil and other subsurface rights; however, this statute appears to have been held invalid in *Cassady v. Consol. Naval Stores Co., Fla.*, 119 So. 2d 35, and is no longer operative. The 1961 legislature enacted Ch. 61-266, adding §192.62, to the F. S., subsection (1) of which provides that:

Any real or personal property which for any reason is exempt or immune from taxation but is being used, occupied, owned, controlled or possessed, directly or indirectly by a person, firm, corporation, partnership or other organization in connection with a profit making venture, whether such use, occupation, ownership, control or possession is by lease, loan, contract of sale, option to purchase or in any wise made available to or used by such person, firm, corporation, partnership or organization, *shall be assessed and taxed to the same extent and in the same manner as other real or personal property.* (Emphasis supplied.)

However, this subsection appears to be limited by subsection (2) of the said section, which provides as follows:

This section shall not apply to property described in subsection (1) when: (a) the property is used exclusively for religious, scientific, municipal, educational, literary, or charitable purposes; (b) the property is owned by the federal government and used by a defense contractor in the fulfillment of a federal government contract; (c) the property is owned or used by the state, any county, municipality, or public entity or authority created by statute and is leased or otherwise made available to such person, firm, corporation, partnership or organization by such public body for a consideration in the performance by the public body of a public function or public purpose authorized by law, or which property prior to the effective date of this act was leased for valuation consideration for purposes not otherwise exempt hereunder; (d) the property is used for maritime construction and repair of vessels engaged in interstate or foreign commerce; (e)

the property is developed for and devoted to the sole use of federal aviation agency installations; (f) the property is used by a corporation performing services of a public nature for the operation of its public utilities facilities thereon; (g) the property is owned by any housing authority heretofore or hereafter organized under chapter 421, F. S., and used for purposes authorized under said chapter; (h) the property is owned by any quadri-centennial commission created by or under the laws of Florida and used by such commission for authorized public purposes; (i) the property is located on Santa Rosa island and is owned or is controlled by any agency thereof created by statute, and is used for public purposes authorized by law.

The above statutory provisions seem to be the only provisions authorizing the separate taxation of easements, leaseholds and other interests in lands.

There being no statute authorizing the separate taxation of easements, leaseholds and other interests in lands, other than §§193.22 and 192.62, public utility easements, leaseholds and other interests in lands, less than the fee, do not appear to be subject to separate taxation. This seems to answer question 2 in the negative. However, attention is directed to §192.58, F. S., which provides that easements for telephone, telegram, pipe line, power transmission or other public service purposes, survive the lien for ad valorem taxes against real property and tax deeds and masters' deeds issued under and pursuant to such liens, the latter portion of which provides that nothing contained in said section "shall be construed to exempt or relieve from taxation, the poles, wires, pipes, equipment and other personal property of the owner of such easement, whether located on the land subject to easement or elsewhere, or affect in any way the enforcement of taxes upon such personal property." Utility poles, wires and pipes situated on rights-of-way, have under some circumstances been held to be a part of the realty, but under other circumstances have been held to be personal property subject to taxation as such, especially where the right-of-way granted to the utility company is a right-of-way in gross.

Question 3 deals with easements, leaseholds, and similar interests in land used as rights-of-way, and not the status of the poles, wires, etc. Except where modified by statute (and we know of no such statute in this state) leases for terms of years, however long, are chattels real falling within the classification of personal property. (51 C. J. S. 531 and 763, §§26 and 37; 32 Am. Jur. 39, §16; 2 Cooley on Taxation, 4th Ed. 1268, §593). Long term leases are, therefore, within the discussion and conclusions of questions 1 and 2. There being no statute, either classifying long term leases as real property instead of personal property, or expressly permitting their separate taxation, question 3 must be answered in the negative, except to the extent they may be within the purview of §192.62, F. S., as added by Ch. 61-266.

Opinions of this office, relative to the separate taxation of leasehold interests in real property, issued prior to Jan. 23, 1958, were, to the extent they were in conflict with *Park-N-Shop, Inc., v. Sparkman*, supra, overruled thereby. Our opinions of 1950, 1953, 1954 and 1957, holding that leasehold interests in tax exempt property were subject to taxation, are no longer deemed effective

by reason of the Park-N-Shop case. Except where changed by some express statute, each parcel of taxable real estate is taxed "at its full cash value, regardless of the existence of estates in it," such an assessment being against the land itself and not the owners thereof. No tax warrant for the collection of real property taxes is ever issued against the owner of the property, as is the case in connection with the taxation of tangible and intangible personal property taxes.

Where privately owned lands have been leased to the federal government as spoilage areas, such areas would appear to continue to be subject to ad valorem taxation; however, no such taxation may be permitted to interfere with the rights and interests of the government. Where spoilage areas are subject to taxation the assessment should be made expressly subject to the rights and interests of the government, and any tax sale certificate issued in that connection should also be issued expressly subject to the rights and interests of the government.

061-168—October 17, 1961

TAXATION

CLASS "C" INTANGIBLE TAXES AND DOCUMENTARY
STAMP TAXES—SUBSTITUTE NOTES AND MORTGAGE
—CHS. 199, 201; §§201.09, 199.02 AND 199.11, F. S.;
§1, ART IX, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where new notes and mortgages are substituted in lieu of existing notes and mortgages prior to maturity and without extension of time of maturity, are such substitute notes and mortgages liable for class "C" intangible personal property taxes and documentary stamp taxes, where such taxes were duly paid on the original notes and mortgages?

In this case one set of promissory notes, payable to two payees, secured by mortgage encumbering two parcels of land of substantially equal value, were, with the joint consent of the maker-mortgagor and payees-mortgagees, delivered up and surrendered, in consideration of the making and delivery of substitute promissory notes and mortgages; there being issued in lieu of the one set of promissory notes and single mortgage, two sets of promissory notes, one set payable to one of the payees-mortgagees and the other set to the other payees-mortgagees. These two sets of promissory notes were equal in amount, together totaling the amount of the prior set, each such set being secured by separate mortgages, one encumbering one of the parcels of land encumbered by the first mortgage and the other the other parcel so encumbered. Each of the two sets of promissory notes was in the same amount. This substitution of promissory notes and mortgages was made prior to the maturity of the first set of notes and in lieu thereof, payable at the same times and upon the same conditions as were the original notes. There were issued two new notes for each of the original notes. The transaction above mentioned does not appear to have been designed to delay the enforcement of the obligation, nor did it establish the promissory note contracts for another period of time.

We are primarily concerned with whether the substitute notes are renewal notes or not. If they are in law renewal notes and meet the requirements of §201.09, F. S., they would seem to be exempt from taxation under Ch. 201, F. S., if the taxes due on the original notes were fully paid. Under said §201.09, "when any promissory note is given in *renewal* of any existing promissory note, which renewal note only extends or continues the identical contractual obligation of the original promissory note and evidences *part or all of the original* indebtedness evidenced thereby, not including any accumulated interest thereon and without enlargement in any way of said original contract and obligation, such renewal note shall not be subject to taxation under" Ch. 201, F. S., provided that "such renewal note has attached to it the original promissory note with canceled stamps affixed thereon showing full payment of the tax due thereon." This seems to bring us to the question of what is a renewal note within the purview of said §201.09. We find no definition of a "renewal note" in Ch. 201, F. S.; we must look to the authorities for said definition.

In addition to the question of whether such substitute notes are within the purview of §201.09, F. S., there arises the question of their status under Ch. 199, F. S., as class "C" intangible personal property, especially §§199.02 and 199.11, F. S., where the tax was paid under said sections, as class "C," when the original mortgage was recorded in the county where the lands lie.

In this connection the terms *extension*, *renewal* and *modification* are used in connection with promissory notes. An *extension* of a promissory note, usually means a valid and binding contract to delay the enforcement of the instrument. Such an extension is usually evidenced by a notation on the instrument or by a separate memorandum signed by the holder of the note. It does not usually involve the execution of a new note, which is usually referred to as a renewal of the note. (10 C. J. S. 758, §263; 35 C. J. S. 347 and 348, notes 68 to 70; Lee v. Quincy State Bank, 127 Fla. 765, 173 So. 900, text 910). In general the term *renewal*, as applied to a promissory note, means the establishment of the particular contract or obligation for another period of time (10 C. J. S. 758, §623). In Lee v. Quincy State Bank, 127 Fla. 765, 173 So. 909, text 910, the court said that "a renewal of a note involves a new contract by the maker or obligor." In 10 C. J. S. 758, §263, it is stated that "the term 'renewal', as applied to a note, means the reestablishment of the particular contract for another period of time, given when the prior or original note became due. There may be a change of parties or an increase of security, but there is no renewal unless the obligation is the same. A renewal, as distinguished from a mere extension, is usually evidenced by a new note or other instrument."

In 76 C. J. S. 1165, notes 15, et seq., it is stated that "it has frequently been said that in commercial and legal usage the term 'renewal' means something more than the substitution of another obligation for the old one; and, in order for there to be a renewal, the new obligation must be of the same nature as the prior obligation, with the same terms and obligations. However, there may be an increase of security, and there may be a change of parties" The following cases support the view that there may be a renewal of a promissory note notwithstanding a change in the parties (Campbell River Timber Co. v. Vierhus, CCA 9th, 86 Fed. 2d 673, text 675, 108 A. L. R. 763, text 766; Sheldon v.

Mississippi Cotton Seed Producers Co., CCA 5th, 81 Fed. 2d 169, text 171; *Edwards v. Goode*, CCA 5th, 228 Fed. 666, text 667; *King v. Edel*, 69 Ga. App. 607, 26 SE 2d 365, text 369; *Lowry Nat'l Bank v. Fickett*, 122 Ga. 489, 50 S. E. 2d 396, text 398; *Live Stock Nat'l Bank v. Minnehaha State Bank*, S. D., 217 N. W. 180, text 183; *Sponhaur v. Malloy*, 21 Ind. App. 287, 52 N. E. 245, text 247). In *Sponhaur v. Malloy*, supra, the promissory note in question had been renewed by the maker's widow after his death. In *Edwards v. Goode*, the promissory note had been "renewed" by *one of the makers*." Although a renewal of a promissory note usually also effects an extension of the time for payment, the court in *Wilcox v. McCain Land and Live Stock Co.*, 37 S. D. 511, 159 N. W. 49, text 50, held that an agreement for a renewal was not strictly speaking an extension. See also 10 C. J. S. 758, §263. The notes given in lieu of the original notes, although not signed by both of the makers of the original notes, bear some relation to a substitute or duplicate note given in lieu of the originals.

In *Samland v. Ford Motor Co.*, 123 Neb. 819, 244 N. W. 404, 87 A. L. R. 1475, text 1480, the Nebraska supreme court was considering the legal effect of a check given as a substitute for and in lieu of one that was lost. The court held that a duplicate or substitute check given for another has the same validity as the original. It adds no more to the obligation and rights of the parties when it is executed at a subsequent time than when its execution is contemporaneous with that of the original. It is simply the original instrument repeated." Under similar circumstances the N. Y. court, in *Benton v. Martin*, 40 N. Y. 345, held that a promissory note made and delivered in lieu of a lost one was made as a substitute for, and to take the place of the original, and that no new liability of the defendant was created thereby.

In *Lewis v. Commercial Nat'l Bank*, 37 Tex. Civ. App. 241, 83 S. W. 423, the court held that "where after the loss of an original check a duplicate was executed by the drawer and indorsed by the payee, such indorsement did not change the payee's relation to the original check, nor create any different liability on the duplicate than that assumed by his original indorsement." In *Goodrich v. Case*, 68 Ohio St. 187, 67 N. E. 295, a new note was given to take the place of an old one which was much worn, the intention of the parties being merely to renew the evidence of the old note, and it was held that the purpose and intention of the parties should govern as to its legal effect, and that such substituted new note was not a written acknowledgment of the old note so as to prevent the running of the statutes of limitations against the old note. In this connection see also annotation in 87 A. L. R. 1480, et seq.

"Bills and notes may be varied by subsequent agreements In this way conditions may be introduced, and, in general, arrangements may be made changing the terms of payment, such as the medium of payment, the amount of payment, the place of payment, or for discharge by payment to a third person" (10 C. J. S. 758, §264). Such changes are often referred to as modifications of the original promissory note or notes. Such changes are strictly speaking neither extensions or renewals in the usual sense of such terms.

Although now represented by two groups, instead of one group, of promissory notes, the overall obligation seems to be the same although evidenced by new documents. Where the makers were formerly liable jointly for the payment of the obligation, each is liable now for the payment of the group of notes signed by him

and not for those signed by the other. There has been a change of parties and of security (see 10 C. J. S. 758, §263, note 21). The original promissory notes, with the consent of all parties concerned, have been replaced by two groups instead of one, with the joint obligors under the original notes now being liable, each for one-half of the original obligation. Under the above rule that a renewal of a promissory note by one of two or more obligors is in law a renewal; had half of the original notes been renewed by one of such obligors, and the other half by the other of such obligors, the resulting new notes would appear to have been renewals under the above authorities. It is, therefore, our view that the two sets of promissory notes, given in lieu of the original notes, one set signed by one of the original obligors and the other set signed by the other original obligor, are in law renewal notes within the purview of §201.09, F. S.

The taxes imposed under said §§199.02 and 199.11, on class "C" intangible personal property, are imposed upon "notes, bonds, and other obligations . . . for the payment of money which are secured by mortgage, deed of trust or other lien upon real property situated in Florida," which taxes are due and payable when the "mortgage, deed of trust or other lien is executed and shall be paid to the county tax collector before the mortgage, deed of trust or other lien securing such indebtedness is presented for recordation." This is not an annual tax, but is payable at the time of the recording of the mortgage, trust deed or other lien. This brings us to the question of renewal notes, and substitute mortgages, when the required tax was paid upon the original notes and mortgage. It is the general rule that a renewal note, one given in renewal of an existing one, does not extinguish the original note or in any way change the debt except as to the time of payment (AGO 058-342; 1957-8 AGO 929). Such a note is within the purview of §201.09, F. S., exempting renewal notes from documentary stamp taxes when said §201.09, is complied with as to the note renewed.

Section 1, Art. IX, State Const., authorizes a tax, payable at the time of the recording of mortgage, deeds of trust and other liens, upon "obligations secured by mortgage, deed of trust or other lien." Although class "C" intangibles are defined, in §199.02, F. S., as "being all notes, bonds and other obligations . . . for the payment of money," we must keep in mind that the constitution refers to "obligations," not notes, bonds, etc. (See above reference to AGO 058-342). Renewal notes brought within the purview of §201.09, F. S., would not appear to raise a new obligation, but would be a continuation of an existing obligation. In order to be within the purview of §201.09, the renewal note must have "attached to it the original promissory note with canceled stamps affixed thereon showing full payment of the tax due thereon." Where several notes are given in renewal of the original one (such as one payable in installments), we do not think that the statute may be construed as requiring that the original note be attached to each and every of the group of renewal notes. Its attachment to some of the renewal notes, with reference to the others, would seem to be sufficient. The retention of the original note is required as evidence that there has been a renewal and not a cancellation and the giving of a new original note or notes.

Whether or not the new note or notes will be considered as originals or renewals will depend largely upon the facts and circumstances surrounding the making and delivery of the new

note or notes. Where the new note or notes are renewals within the above authorities, and the requirements of §201.09, are complied with there would seem to be no additional documentary stamp taxes or intangible taxes due upon the renewal note or notes, other than a 10¢ stamp under the rule of *State v. Cook*, 108 Fla. 157, 146 So. 223. These conclusions are predicated upon the assumption that no new or additional obligations are included in the renewal note or notes. Where renewal notes are secured by new or additional mortgages, deeds of trust or other liens, proper notations should be made thereon showing payment of the taxes due at the time of the recording of the original mortgage, deed of trust or other lien.

These observations answer the above question in the negative; subject, however, to the meeting of the conditions set out in §201.09, and otherwise as mentioned above.

061-169—October 18, 1961

**STATE AND COUNTY OFFICERS AND EMPLOYEES
TRANSFER OF CERTAIN EMPLOYEES UNDER MERIT
SYSTEM PURSUANT TO CH. 61-289, LAWS OF FLORIDA
(§112.051, F. S.)**

To: Burnis T. Coleman, General Counsel, Florida Industrial Commission, Tallahassee

QUESTIONS:

1. In view of the provisions of Ch. 61-289, may an employee under the merit system who has attained age 65 transferred to a job involving less responsibility, and appropriately lesser salary regardless of whether he is eligible for retirement under a state retirement law?

2. Would the answer be the same if the employee has attained age 70?

Chapter 61-289 provides that any agency under the merit system may retire any employee on the basis of his age when such employee has reached the age of 65. Before such retirement may be effectuated, the employee must have reached the age of 65 and be eligible for retirement under any state retirement system. A more detailed discussion of §§1 and 2 of said chapter may be found in AGO 061-138, Sept. 6, 1961.

Under the provisions of §3 of Ch. 61-289 it is provided, among other things, that employees attaining the age of 65 may be transferred to a job requiring less responsibility if the department in which he is employed determines that such employee is unable to satisfactorily carry out the full duties of his position.

AS TO QUESTION 1:

You inquire in particular whether as a condition precedent to the transfer of an employee pursuant to §3, it is necessary that such employee be eligible for retirement. Eligibility for retirement under any state retirement system is a condition precedent to the termination of employment of 65 year old merit system employees. (See §1, Ch. 61-289). However, there is no such similar condition with respect to 65 year old merit system employees who are transferred. Transfers are matters within the discretion of the employing merit system agency. Had it been intended that the transfer of employees be conditioned upon eligibility for retirement, it would seem that the legislature would have specifically made provisions to that effect; similar to what was done with respect to

termination of employment under §1, Ch. 61-289, supra.

Therefore, it is my opinion that a merit system employee who has attained the age of 65 may be transferred to a job involving less responsibility regardless of whether such employee is eligible for retirement under any state retirement system; provided, however, that the department in which he is employed has determined that such employee is unable to satisfactorily perform the duties of his position. Your question is therefore answered in the affirmative.

AS TO QUESTION 2:

The observations and conclusions reached in the answer to question 1 are also applicable with respect to question 2. Question 2 is also answered in the affirmative.

061-170—October 18, 1961

TAXATION

NONPROFIT CORPORATIONS—TAX EXEMPTIONS, CHARITABLE AND RELIGIOUS PURPOSES—§1, ART. IX, §16, ART. XVI, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Is a religious and charitable nonprofit corporation or association, organized or incorporated under the laws of another state, making charitable donations and performing religious and charitable functions in other states and countries, entitled to tax exemption for its properties located in this state?

Under §§1, Art. IX, and 16, Art. XVI, State Const., as implemented by §192.06, F. S., for property to be entitled to tax exemption, unless otherwise expressly exempted by some constitutional provision, all property in this state is subject to taxation, "unless such property be held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes," or is entitled to governmental immunity from taxation. "The right to the exemption is determined by the use the property is put to and not by the character of the corporate owner." (*State v. Doss*, 150 Fla. 486, 8 So. 2d 15, text 16, *State v. Doss*, 146 Fla. 752, 2 So. 2d 303, text 304; *Lummus v. Fla. Adirondack School*, 123 Fla. 832, 168 So. 232, text 238; *Univ. Club v. Lanier*, 119 Fla. 146, 161 So. 78, text 79). "It is the property and not the corporate entity which is exempt." (*Lummus v. Fla. Adirondack School* supra). Before property may be granted tax exemption in this state, except where otherwise expressly provided in the state constitution, it must be used for one or more of the purposes mentioned in §1, Art. IX and §16, Art. XVI, State Const. (*Univ. Club v. Lanier*, supra, and *Dr. William Howard Hay Foundation v. Wilcox*, 156 Fla. 704, 24 So. 2d 237).

Section 1, Art. IX, and §16, Art. XVI, State Const., have been construed as limitations "upon the power of the legislature to provide for the exemption from taxation of any classes of property except those particularly mentioned classes specified in the organic law itself." (*L. Maxcy, Inc. v. Fed. Land Bank*, 111 Fla. 116, 150 So. 248, text 250; *State v. St. John*, 143 Fla. 544, 197 So. 131, text 134; *State v. Doss*, 146 Fla. 752, 2 So. 2d 303, text 304). Similar questions have been considered in AGO 061-63, of

April 19, 1961, 061-76, of May 12, 1961, 061-104, of June 30, 1961, 061-111, of July 17, 1961, and 061-113, of July 17, 1961. The question is primarily one of fact; is the property claimed to be tax exempt being "held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes," so as to be within the above mentioned constitutional and statutory provisions?

We are primarily concerned with an organization, known as "The Friends of Israel Missionary and Relief Society, Inc.," a non-profit corporation organized and existing under the statutes and laws of the commonwealth of Pennsylvania, formerly known and designated as "The Friends of Israel Relief Committee," its name having been changed to the present on May 21, 1943. Among the purposes of the corporation, as expressed in its charter as amended, are "to establish and maintain a testimony at home and abroad to the Jewish people that Jesus Christ is the Messiah; to extend practical aid to Jews and Hebrew Christians in distress, in such ways as may be determined by the officers of the corporation; to unite in a cooperative fellowship Hebrew Christians for the ministry or mission field; to prepare and publish literature setting forth the message of Hebrew Christianity." We gather from these objects and purposes that many of the objects and purposes above mentioned will not be carried on in Florida, but in other states and countries. The authorities are conflicting as to the right of a charitable corporation or association to tax exemption for its property within a state where its activities are carried on outside of the state (84 C. J. S. 539, §282); however, the Nemours foundation, which was established by Alfred I. duPont, and maintained, or was to maintain, much of its charitable functions in Delaware, appears to have been deemed a charitable institution by the court in Florida *Nat'l Bank v. Simpson*, Fla., 59 So. 2d 751, although the question was not expressly discussed. Although missionary and relief purposes of a religious and charitable corporation or association are carried on without the state and in other states and countries, we do not feel that this will prevent property in this state from being deemed to be held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes," within the purview of §1, Art. IX, and §16, Art. XVI, State Const.

We find nothing in the charter of "The Friends of Israel Missionary and Relief Society, Inc.," a Pennsylvania nonprofit corporation, which would prevent it being granted tax exemption as to properties owned and held by it in Florida, upon a showing by it, satisfactory to the tax assessor, that the property in question is being "held and used exclusively (by it) for religious, scientific, municipal, educational, literary or charitable purposes." The said corporation has the burden of proving to the satisfaction of the tax assessor that the property claimed by it to be entitled to tax exemption is being so held and used. Such use must be the primary and not a secondary use. Its costs and expenses of administration and operation must not be out of line with the usual corporation or association performing like and similar services. The fact that the corporation or association has been organized as a nonprofit one, is not of itself sufficient to prove its right to exemption, but there shall be made a showing, satisfactory to the tax assessor, that the property claimed as tax exempt is, in the language of §16, Art. XVI, State Const., being "held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes," in the light of §192.06, F. S.

The above stated question is, therefore, answered in the affirmative, provided the taxpayer shows to the satisfaction of the tax assessor that the property claimed to be tax exempt is being "held and used exclusively" for one or more of the purposes above mentioned.

061-171—October 18, 1961

DEVELOPMENT COMMISSION

APPOINTEE MEMBERS—TRAVELING EXPENSES, MILEAGE AND PER DIEM—§§288.02(2), 112.061, 340.05, 550.03, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are the appointed members of the Florida development commission restricted as to their actual and necessary expenses incurred in the performance of their official duty by the maximum mileage and per diem rates as found in §112.061, F. S.?

Your attestation is respectfully directed to §288.02(2), F. S., which provides as follows:

(2) Members of the commission shall receive no compensation for their services but shall be entitled to receive their actual and necessary expenses incurred in the performance of their official duties.

Section 112.061, F. S., provides in part as follows:

State officers and employees . . . when traveling . . . on state business shall be allowed for subsistence \$11 per diem . . . the amount to be allowed for mileage shall be 10¢ per mile . . . state officers and employees traveling by any common carrier on state business shall procure from the state comptroller and use a transportation request, which the comptroller is required to furnish the form of which shall be substantially the same as now used by the federal government . . .

It is elementary in statutory construction that where there is a conflict the last expression of the legislature will prevail. Section 288.02(2) was Ch. 29788, 1955, and §112.061 was amended as to amounts and re-enacted by Ch. 57-230. There is an irreconcilable conflict by the statutes in my judgment. One provides that the commission members will receive their actual and necessary expenses incurred in the performance of their official duties without limitation. The other and more recent statute provides that all state officers and employees, when traveling on state business, shall receive the amount therein specified and no more. In view of this conflict the last expression of the legislature will prevail.

There are further and more compelling reasons for the above conclusion. The intention of the legislature is the pole star in determining proper construction to be placed on a statute. I have reviewed the statutes of other agencies of the state who operate under the supervision of an administrative agency and find that these generally have statutory language similar to that in Ch. 288. I call your particular attention to the turnpike authority statute, §340.05, which provides in part:

. . . the other members shall serve as members of the authority without compensation; provided, that each member of the authority shall be reimbursed for necessary

expenses incurred in the performance of his duties and the provisions of §112.061, or amendment thereto shall be inapplicable.

You will note that this was originally Ch. 28128, 1953.

You will also note that §550.03, F. S., provides in part as follows:

... the compensation of each member of the racing commission shall be ... together with necessary expenses including traveling expenses as may be approved by the commission and the provisions of §112.061 shall be inapplicable ..."

With the exception of the racing commission and the turnpike authority, all the other statutes appear to be similar with minor variations to the subject statute. See §392.01, (tuberculosis board); §349.03 (Jacksonville expressway authority); §348.041 (St. Petersburg expressway authority); §334.09 (state road board); §245.02 (state anatomical board); §240.10 (board of control).

The comptroller advises that his office has consistently held, except where another statute specifically provides, that the limitations of §112.061 are inapplicable; said §112.061 prescribes the maximum mileage and per diem to be allowed for state officials' and employees' expenses in these respects. The rule as found in the case of *Green v. Stuckey's of Fanning Springs*, 99 So. 2d, 867, text 868, would appear to be appropriate. This rule is to the effect that the administrative interpretation of the statutes by those charged with this responsibility is entitled to great weight and shall not be overcome unless greatly erroneous or for some cogent reason. In view of this administrative construction of many years standing, and the legislature having specifically recognized this interpretation by specifying in at least two instances that the limitation would not be applicable, it could not be said that the interpretation was erroneous and no cogent reason appears therefor.

The legislative intent could not be better nor more clearly expressed than the last sentence of §112.061(1) which was added to the statute by virtue of Ch. 57-230, and is as follows:

The foregoing shall apply to all *per diem and traveling expense allowances* on and after April 1, 1957.

This would appear to place a limitation in full force and effect in all instances except where the legislature has specifically provided that same shall not be effective.

With the above in mind, your question must be respectfully answered in the affirmative.

061-172—October 19, 1961

DRIVERS' LICENSES

CONSTRUCTION OF §322.18, F. S., AS AMENDED BY CH. 61-13,
LAWS OF FLORIDA

To: *Farris Bryant, Governor of Florida, Tallahassee*

QUESTION:

What is the present status of Florida motor vehicle drivers' licenses purporting on their face to expire on Sept. 30, 1961?

Section 322.18, F. S., as amended by Ch. 61-13, which chapter became effective on July 1, 1961, provides, in so far as here material, that "except for persons born during the month of September, every

Florida driver's license which expires Sept. 30, 1961, is extended and valid without any additional license fee until midnight of the last day of the licensee's birth month as the same appears upon said license, unless said date falls on Sunday or a holiday, in which case the license shall expire on Monday or the day following the holiday" This extension of the expiration of Florida drivers' licenses was made in connection with a major change in the issuance of drivers' licenses; previous to the adoption of said Ch. 61-13, all drivers' licenses issued in Florida expired on September 30 of the license year. Under the revised plan, such drivers' licenses expire on the last day of the month in which the drivers' birthday occurs, so that such licenses in the future will be issued throughout the year instead of during the month of September of each year. The plan also provides for two-year licenses, instead of the former one year licenses, after a one year period, provided for accomplishing the transition.

The amended statute accomplished the extension of the licenses expiring Sept. 30, 1961, automatically to the end of the month in which the licensee's birthday occurs. However, licensees are permitted to procure from the county judges verification of the said extension to be written or stamped on their licenses. This verification is not necessary to accomplish the extension, but provides official evidence of the same. Officers in Florida accept the birth date appearing on the license as evidencing the date of expiration.

061-173—October 19, 1961

EMINENT DOMAIN

PROCEEDINGS BY THE UNITED STATES—APPLICATION OF §73.011, F. S.—TAX STATUS OF LANDS INVOLVED

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTIONS:

1. Does §73.011, F. S., as added by Ch. 61-479, relating to eminent domain proceedings, have any application to eminent domain proceedings brought by the U. S. in the federal courts?

2. What is the tax status of lands in this state after the filing of a declaration of taking, in connection with an eminent domain proceeding in the federal courts?

The above stated questions are concerned with the application of §73.011, F. S., as added by Ch. 61-479, which purport to give the courts, in eminent domain proceedings, "jurisdiction and authority over any and all taxes and assessments encumbering lands involved in such proceedings and may stay or defer the enforcement of such taxes and assessments, including all applications for tax deeds, foreclosures and other enforcement proceedings, until final termination of such eminent domain proceedings," and further to "make such orders concerning such taxes and assessments as may be equitable and proper; providing, however, that ad valorem taxes levied upon any such lands shall be prorated against the owner to the date of taking." The said act is by its terms made applicable to "pending cases which have not reached final judgment." The said act became effective on June 22, 1961.

Under the statutes and laws of Florida ad valorem taxes against real and tangible personal property are imposed as of January 1 of the tax year, the same being the tax day in Florida, and become

a lien on said day, although the taxes are not due and payable until around the first of the following November (§§192.04 and 193.49, F. S.; *Delores Land Corp. v. Hillsborough County, Fla.*, 68 So. 2d 393; *Thompson v. Key West, Fla.*, 82 So. 2d 749; *Gelb v. Aronovitz, Fla. App.*, 98 So. 2d 375, text 378). The tax statutes of Alabama are very similar to the Florida Statutes, except in Alabama the tax day is October 1 instead of January 1, as in Florida. The court, in *U. S. v. Alabama*, 313 U. S. 274, 61 S. Ct. 1011, 85 L. ed. 1327, held that under the statutes and laws of Alabama ad valorem taxes assessed against real property became effective for the entire tax year on the tax day, although not due and payable until a later day. In this case the U. S. had purchased certain lands in Alabama, for governmental purposes, some on the tax day and other soon thereafter. In a suit to quiet title against Alabama, the U. S. contended that upon its purchase of the lands that the tax lien ceased to exist against the U. S., or if it did exist the taxes should be prorated as of the date of the purchase, the taxes for the remainder of the year being cancelled by reason of the purchase by the U. S. With this the court did not agree. The court held that under the statutes and laws of Alabama the taxes for the entire year accrued as of the tax day, although the assessment was not made until a later date, and that the U. S. took the title to the said lands subject to the lien for the entire tax for the year.

Our examination of the file handed us with your request for opinion reveals a statement, by the tax assessor for Brevard county, that on "Aug. 24, 1961, the U. S. government filed an order of 'intent to take' in the federal court in Orlando, for some 67,000 acres of land in Brevard county." The said tax assessor makes the further statement that "there will be many parcels which will not have been acquired and will necessarily be taken into court on condemnation proceedings to bring about acquisition." He then poses the question "will the land not actually acquired by Jan. 1, 1962, be taxable land on the tax rolls of Brevard county for the year 1962?" Unless the title to the lands has passed to the U. S. prior to Jan. 1, 1962, the said lands would appear to be subject to ad valorem taxation for the tax year of 1962. The fact that a proceeding in eminent domain has not been finally terminated is not evidence that title has not passed to the U. S. Often the U. S., upon the filing of a petition for the taking of lands by eminent domain for governmental purposes, or concurrent therewith, will file its declaration of taking under §258a, title 40 of the U. S. code, and obtain an order thereon by the court, consequent upon which title is immediately vested in the U. S., and the claims of the owners and lien holders, as well as all other claims, against the lands are transferred to the deposit made pursuant to the declaration of taking and order thereon. Should such a declaration of taking and order be made title would immediately pass to the U. S. Whether or not such a declaration of taking and order thereon has been filed may be ascertained from the clerk of the district court or from the attorney representing the U. S.

Although said §73.011 purports to authorize the court to prorate the ad valorem taxes encumbering a parcel of land taken by eminent domain, we find nothing in said section permitting the imposition of any portion thereof against the government, state or federal, when the taking is by the state or federal government or their agencies. Where the taking is by a public utility or similar company not entitled to tax exemption, doubtless such a proration

might be made, making the utility or similar company liable for its portion of the tax. However, where the government, state or federal, is the party taking the land in question, may such a proceeding be followed, in the light of the accrual of the taxes for the entire year on the tax day? This is doubted where the federal government is taking the lands under eminent domain. It is a general rule of statutory construction that neither the government, state or federal, nor its agencies, are considered to be within the purview of a statute unless an intention to include them is clearly manifested by such statute or otherwise (82 C. J. S. 554-558, §317). The Florida legislature is without power to bind the U. S. by its own legislation, without the consent of the congress. The application of §73.011, above mentioned, to the U. S., in eminent domain proceedings instituted by it in its own courts, seems doubtful.

AS TO QUESTION 1:

We entertain serious doubt as to the application of §73.011, F. S., as added by Ch. 61-479, to proceedings in eminent domain filed by the U. S. in its own courts.

AS TO QUESTION 2:

The tax assessor, sometime after the first of the year, should ascertain from the clerk of the district court, or the attorney for the U. S. handling the eminent domain proceedings in question, what lands have been included in declarations of taking and the orders thereon up to January 1, 1962. Where such declarations of taking have been filed and orders made thereon title will usually have passed to the U. S., although the eminent domain proceedings may still be pending.

061-174—October 23, 1961

ELECTORS AND ELECTIONS

ELIGIBILITY AND QUALIFICATIONS OF ELECTORS PARTICIPATING IN SCHOOL MILLAGE AND TRUSTEE

ELECTION—§§101.111, 100.241, 101.32, 101.47,
101.48, 101.49, 236.32, 102.051, F. S.

To: *Thomas D. Bailey, Superintendent of Public Instruction, Tallahassee*

QUESTIONS:

1. In a county which has adopted the use of voting machines can the school board elect not to use such machines in a biennial school trustee and millage election?

2. Can the election officials in a biennial school trustee and millage election require electors to prove their qualifications through the presentation of a tax receipt showing the payment of taxes on real or personal property for the next year preceding the election or the current year, or require signing of an affidavit of eligibility by the elector in lieu of the presentation of a tax receipt?

3. If question 2 as set out herein is answered in the affirmative can such affidavit be taken and acknowledged by the clerk or one of the inspectors of the election?

AS TO QUESTION 1:

Section 101.32, F. S., provides the manner for adopting the use of voting machines and provides in part:

... If a majority of the electors approve of same, the board of county commissioners of the county or governing body of the municipality shall adopt for use at elections any kind of voting machine that meets the requirements set forth in §101.28, and the machines shall be used at *any and all elections* held in the county or municipality or any part thereof for voting, registering and counting votes cast at any election; ... (Emphasis supplied.)

Legislative intent is the pole star by which we must be guided in construing acts of the legislature (Ervin v. Peninsular Tel Co., Fla., 53 So. 2d 647, Smith v. Ryan, Fla., 39 So. 2d 281, and Fla. State Racing Comm. v. McLaughlin, Fla., 102 So. 2d 574). Where the legislative intent is clearly manifest by the language used, considered in its ordinary grammatical sense, rules of construction and interpretation are unnecessary and inapplicable (Clark v. Kreidt, 145 Fla. 1, 199 So. 333).

In this instance the statute is specific and clear where it provides that when voting machines have been adopted for use within a county said voting machines shall be used at "any and all elections held in the county." (Emphasis supplied.) In the light of this statutory requirement it appears obvious that a school board has no discretion in connection with the use of paper or other type ballots in lieu of voting machines where said machines are available but rather the voting machines must be used. Accordingly, question 1 as set out above is answered in the negative.

AS TO QUESTION 2:

Section 236.32, F. S., provides:

Procedure for holding and conducting school district elections.—The procedure for holding and conducting school district elections shall be:

* * *

(4) **QUALIFICATIONS OF ELECTORS.**—All qualified electors residing within any school district in the state whose voting registration is in that district, who pay a tax on real or personal property within the district, shall be entitled to vote in this election.

Section 101.47 (1), F. S., provides in part:

In all elections where voting machines are used, every elector desiring to vote is required to identify himself to the clerk and inspectors of the election as a *duly qualified elector at such election*. ... (Emphasis supplied.)

While there might at first blush appear to be little need for the election clerks or inspectors to require the display of a tax receipt since the county supervisor of registration is under the provisions of §236.32(2), F. S., to furnish a complete list of those electors who meet the eligibility requirements set out in §236.32(4), F. S., (see the answer to question 1 presented in AGO 051-377, p. 405 of the 1951-52 biennial report of the attorney general) it is to be borne in mind that as a practical matter it is apparently somewhat difficult to furnish a perfect list of taxpaying electors. Since the election officials are required under the provisions of §101.47(1), F. S., quoted above, to identify all persons presenting themselves to vote as qualified electors it would appear that where an election inspector or clerk is in doubt as to the qualifications of an elector it would be an appropriate safeguard to authorize the election official to request the presentation of an appropriate tax receipt or request the elector to sign an affidavit stating that he

is a registered elector and that said taxes have been paid when a tax receipt is not conveniently available so as to establish, *prima facie*, proper elector qualifications. Granted there is no statutory authority providing for the completion of such an affidavit, however, it would seem a far greater menace to the security of constitutional rights if the law regulating elections might prevent the vote of a duly qualified citizen from being cast and counted. Thus, this office would be inclined toward the position that any person shown on the registration books as a registered elector should be permitted to vote if said books reflect that he or she is a taxpaying elector or if said taxpaying status is not indicated he should be afforded the opportunity to establish his taxpaying status through the presentation of an acceptable tax receipt or by signing an affidavit. Should a registered elector pay his taxes at a time subsequent to the closing of the registration books and prior to the closing of the polls, this office would be further inclined toward the position that said elector should be permitted to establish his eligibility for a school millage and trustee election by completing an affidavit much the same way as freeholders may establish their freehold status on election day under the provisions of §100.241(3), (d), F. S.

In those instances where there is doubt as to the eligibility of an elector, this office has previously held (see AGO 051-377, *supra*) that it would not be unreasonable to require the elector to complete the signed statement of eligibility affirming the payment of taxes on real or personal property for the current year or the year next preceding election. Accordingly, question 2 is answered in the affirmative.

AS TO QUESTION 3:

Authority to administer oaths may be implied, 67 C. J. S. 7, Oaths and Affirmations, §5(b), and there is here an implication from at least four other sections of the state election code (§§101.111, 101.48, 101.49 and 102.051, F. S.) that an election official may administer an oath or affirmation in connection with election matters. Therefore, it is suggested that the election officials administer an oath in connection with the signing of an affidavit of voter eligibility. Out of an abundance of caution this office would have to suggest that even though it is our position that the election officials should have the authority to administer an oath in such a case, some doubt as to the validity of administering such an oath or affirmation by the election officials without specific authority does exist as was pointed out in AGO 051-377 and thus question 3 is answered accordingly.

061-175—October 27, 1961

TAXATION

TAX EXEMPT STATUS OF HOME FOR AGED OWNED AND OPERATED BY CHURCH—CHARGE MADE FOR BOARD AND SERVICES—§1, ART. IX, §16, ART. XVI, STATE CONST. §192.06(3), F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Is a home for aged persons, owned and operated by an organized church, contracting with aged persons to supply them, for a consideration, with room, board and

medical services, during the remainder of their natural lives, for that reason entitled to tax exemption?

Section 1, Art. IX, and §16, Art. XVI, State Const., have been said to be limitations "upon the power of the legislature to provide for the exemption from taxation of any classes of property except those particularly mentioned classes specified in the organic law itself." (*L. Maxcy, Inc., v. Fed. Land Bank*, 111 Fla. 116, 150 So. 248, text 250; *State v. St. John*, 143 Fla. 544, 197 So. 131, text 134; and *State v. Doss*, 146 Fla. 752, 2 So. 2d 303, text 304). Said sections of the organic law of this state require the taxation of property, other than governmental property, unless it is "held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes," or is otherwise expressly exempted by some other section of the Florida constitution. This brings us to the question of whether or not the property claimed to be tax exempt is being held and used exclusively for one or more of the purposes mentioned in said §1, Art. IX, and §16, Art. XVI, State Const.

Under the plan outlined in your file handed us with the request for opinion, for an applicant to qualify to become a guest of the home for the aged, he or she must meet the requirements of the plan, including having attained a specified age, pay a founder's fee of around \$5,000, pay a monthly charge or fee for board, room, and minor medical care of around \$200, and otherwise conform to the requirements of membership in the home. Those who so qualify become, upon complying with and conforming to the requirements for membership, entitled to residence in the apartment house or dormitory contemplated by the plan, the occupancy of a room therein, board and minor medical care, in consideration of the said payments made or to be made as aforesaid. We are advised, from examination of your file handed us with the request for opinion that "any profit made will be used first in retiring the mortgage, and if there is an excess after the mortgage payments are made, the excess would be used by the church for its general charitable purposes." These facts bring us to the question of whether or not the property claimed to be tax exempt is "held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes," within the purview of the above mentioned constitutional provisions.

The furnishing of living quarters, food and medical care to aged persons for a consideration, as outlined above, would not seem to be subject to classification as a scientific, municipal, educational or literary purpose as such terms are generally understood. This then brings us to the question of whether the said furnishing of living quarters, food and medical care for a consideration would be either a religious or charitable purpose. A religious society has been defined as an assembly met, or a body of persons who usually meet, in some stated place for the worship of God and religious instruction (76 C. J. S. 734, §1), and a religious corporation, as a corporation, the purpose of which is directly ancillary to divine worship and religious teaching (76 C. J. S. 737, §1). The term "religious purposes" is closely related to and largely analogous to the term "religious worship." (*Laird v. State*, 69 Tex. Cr. R. 553, 155 S. W. 260, text 262). In *Board of Foreign Missions v. Board of Assessors*, 244 N. Y. 42, 154 N. E. 816, text 817, property owned by a foreign mission board rented to persons unconnected with missionary undertakings for income purposes was held not to be

property held for a religious purpose. A building owned by a religious organization used for the operation of a book store for profit was held not entitled to tax exemption as being used for a religious purpose in *Defenders of the Christian Faith, Inc. v. Horn*, 174 Kan. 40, 254 P. 2d 830, text 832. Under these authorities it is doubted that a building owned by a church or religious body and rented to individuals for a consideration would of itself entitle the said property to tax exemption as being held and used exclusively for a religious purpose.

We come next to the question of whether the building described in the above question is being held and used exclusively for some *charitable purpose* so as to entitle it to tax exemption under the provisions above mentioned. The Florida court, in *Jordan v. Landis*, 128 Fla. 604, 175 So. 241, text 246, quoted with approval, from *Jackson v. Phillips*, 14 Allen (Mass.) 539, text 556, as follows:

A charity, in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their minds or hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government. . . .

Although property may to a minor extent be used for charitable purposes, its major use seems to be the determining factor (*Johnson v. Sparkman*, 159 Fla. 276, 31 So. 2d 863, text 864). In this case the court remarked that "so far as the record discloses the use of the property in question for charitable or educational purposes is a mere incident to its main use to bring it within the constitutional exemption it must be actually occupied and used exclusively for one or both these purposes Property exempt from taxation under the constitution for charitable and educational purposes has reference only to such property as is dedicated to the public and used exclusively to that purpose or to such extent as §192.06, F. S., defines." *State v. Doss*, 146 Fla. 752, 2 So. 2d 303, text 304, seems to have involved a four-story building, the top four stories of which were used as a medical center "for charitable purposes," with the first story being rented for general business purposes, with the rents going exclusively to the operation of the medical center in connection with its charities. The building was held to have been used for charitable purposes within the purview of §192.06(3), F. S.

In *Simpson v. Bohon*, 159 Fla. 280, 31 So. 2d 406, the basement and ground floor of the Elks club building in downtown Jacksonville had been rented for business purposes, consisting of about 43% of the said building, with the remainder, about 57% of the building, being used for lodge or fraternal purposes. A large portion of the rent so received was used for the purpose of paying off a mortgage encumbering the said building. The 57% of the building used for lodge or fraternal purposes was exempted from taxation, with taxes being imposed against the said 43% of the said building. The use of the rentals for the purpose of paying off the mortgage was held not a use for some "religious, scientific, municipal, educational, literary or charitable purpose," and the exemption was denied. No showing is made that at least 25% of the building is or will be used for educational, literary, benevolent, fraternal, charitable or scien-

tific purposes so as to bring it within the purview of §192.06(3), F. S., as amended in 1961.

The above question is answered in the negative, unless and until a satisfactory showing is made to the taxing officials that it is held and used exclusively for some religious, scientific, municipal, educational, literary or charitable purposes. Under §192.06(3), F. S., as amended in 1961, if not more than 75% of the building is rented, with the rentals therefor being used exclusively for educational, literary, benevolent, fraternal, charitable or scientific purposes, and the remaining 25% of the building is actually used for one or more of said purposes by the institution, then tax exemption may be allowed.

061-176—October 27, 1961

DOCUMENTARY STAMP TAXES

WRITTEN CONTRACTS FOR SALE AND CONVEYANCE OF
REAL PROPERTY—EFFECT OF WEINBERG CASE ON
AGO 059-244—CH. 201, LAWS OF FLORIDA;
§201.08, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

To what extent, and in what manner, did the supreme court's opinion in *State ex rel Weinberg v. Green*, as comptroller, decided July 26, 1961, have on AGO 059-244, of Nov. 25, 1959, as revised?

This office by AGO 059-244, of Nov. 25, 1959, as revised Feb. 25, 1960 (1959-1960 AGO 381-385), held written contracts for the sale and conveyance of real property subject to taxation, under and pursuant to Ch. 201, F. S. *State ex rel Weinberg v. Green*, supra, involved a contract for the sale and conveyance of certain described real property, containing the provision that "as against the buyer or subsequent purchaser from the buyer, or any beneficiary for whom they may be acting, it being the understanding of the parties that the seller will look only to the land itself for payment of the balance of the purchase price." With this provision the court held that there was no "written obligation to pay money" within the purview of §201.08, F. S.; that the contract in question "does not fix a debt and promise its payment." It appears to have been the view of the court that under rule or ejusdem generis the use of the phrase "written obligations to pay money," with the terms promissory note, non-negotiable note, etc., makes it of the same genus as such notes.

In the light of this court opinion contracts for the sale of land, containing no "written obligation to pay money" of the same nature of promissory notes and non-negotiable notes, are not to be deemed written obligations to pay money within the purview of §201.08, F. S. (See also *Metropolis Pub. Co. v. Lee*, 126 Fla. 107, 170 So. 442. Our said opinion 059-244, supra, should be construed as extending to contracts for the sale of land containing express obligations to pay money, as above discussed, of the same genus as promissory notes and non-negotiable notes. With this limitation the said opinion 059-244, of Nov. 25, 1959, as revised, is adhered to and confirmed.

061-177—November 2, 1961

TAXATION

ASSESSMENT OF REAL PROPERTY—CONSTRUCTION OF SUBSECTION (4), §193.11, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

What is the meaning of the phrase "upon which active construction of improvements is in progress and upon which such improvements are not substantially completed," as used in §193.11(4), F. S.?

Chapter 61-240 added a subsection (4) to §193.11, F. S., providing that "all taxable lands upon which active construction of improvements is in progress and upon which such improvements are not substantially completed on the first day of January of any year shall be assessed for such year, as unimproved lands. Provided, however, the provisions hereof shall not apply in cases of alteration or improvements of existing structures."

Under the taxing statutes of this state real and personal property is subjected to taxation as of January 1 of the tax year. This tax year in Florida is the same as the calendar year (§§192.04 and 193.49, F. S.; *Gelb v. Aronovitz*, Fla. App., 98 So. 2d 375, text 378). The value of the property as of January 1 of the tax year fixes its value for tax purposes for that year. Such property is required by statute to be assessed, for purposes of taxation, at its full or true cash value. (Sections 193.06, 193.11, 193.12, 193.13, 193.22, 199.05 and 200.06, F. S.).

Section 193.20, F. S., provides in part that "nonbearing fruit trees shall not be considered as adding any value to" the land upon which planted; which section was upheld in *L. Maxcy, Inc., v. Federal Land Bank*, 111 Fla. 116, 150 So. 248, 151 So. 276. It doubtless was the view of the legislature when it adopted Ch. 61-240, the same being §193.11(4), F. S., that improvements add to real value to land until they are substantially completed. In some states partially constructed buildings have been held to add value to the lands and taxable to the extent they add value to the property (84 C. J. S. 182, §72, note 48). Likewise property belonging to a Y. M. C. A. or similar organization has been held not entitled to tax exemption until so improved as to be usable for the purposes of the organization (51 Am. Jur. 611, §643). In *People v. Boyland*, 13 Ill. 2d 575, 150 N. E. 2d 589, the building consisted of a basement and three floors, with the basement and first floor completed and put to use on or before the tax day. It was held that this portion of the building was to be taken into consideration when valuing the property for purposes of taxation. Said §193.11(4), *supra*, adopts the rule that an improvement, or unit thereof, is not subject to taxation until *substantially completed*.

In *Williamsport Planing Mill Co. v. Maryland Casualty Co.*, 129 N. J. L. 333, 29 A. 2d 731, text 732, the term "substantially completed" was held to imply "that there remained uncompleted a part of the work which would require the use of labor or materials or both to finally complete the building." It has been held that 300 days and 305 days was substantially a year for some purposes (*Texas Employees Insurance Ass'n. v. Reed*, Tex. Civ. App., 150 S. W. 2d 858, text 865; *Federal Underwriters Exc. v. Bullard*, Tex. Civ. App., 128 S. W. 2d 126, text 134). The word "substantially"

has been variously defined as meaning in a substantial manner, in substance, in the main, essentially, solidly, actually, really, truly, completely, etc. (83 C. J. S. 765). The word "complete" "has been defined as meaning to accomplish that which one starts out to do; to achieve, consummate, execute, to bring to desired condition or end, to end, to finish, to perfect.

The above stated question is not subject to a positive and fixed definition, because what may be a substantial completion of a building for one purpose might not be a substantial completion for another purpose. Generally, a building ready for occupancy, except for certain finishing touches necessary for final completion, would be deemed substantially complete. The nature of the occupancy should be taken into consideration, under some circumstances complete completion may not be required for occupancy, while in other cases complete completion may be necessary. Where a building, or a large part of it, *has been occupied*, although additional labor and materials may be necessary for final completion, it may be presumed to be substantially completed.

In the case of a shopping center, for example the so-called Apalachee parkway shopping center, consists of one or more large buildings, constructed sometimes first in shell form, with specific construction of store space for certain business firms. The said Apalachee parkway shopping center is divided into what may be referred to as three general buildings substantially separated from each other, one such building being occupied by Sears, Roebuck & Co., and another by the Colonial Grocery Co. The third building is divided up into numerous stores under a single roof, including the Duval Jewelry Co., Thom McAn Shoe Store, Neisner's, Walgreen's, Winn-Dixie, and others. The so-called third building presents some problems in this connection.

Store space in the shell building is provided substantially on order in the first instance, so that such store space is substantially complete when ready for occupancy. Each substantially completed store space, and not the entire shell space covered by a roof, should be considered the taxable unit for the purpose of fixing the valuation of the overall building. Portions of the so-called shell building, (not rented for some purpose, not constituting store or other space), should not be deemed as adding taxable value to the land upon which such portions are located. The building permit for the construction of a shopping center does not determine the taxable units in said shopping center buildings.

This answers the above question as specifically as the same may be generally answered.

061-178—November 2, 1961

**COUNTY ORGANIZATION, OFFICERS, REGULATIONS
AUTHORITY OF COUNTY TO ACQUIRE REAL PROPERTY—
TAX SALE CERTIFICATE—§§5, 6 AND 7, ART. VIII,
STATE CONST.**

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

May a county acquire a tax sale certificate, at other than at a tax sale, and enforce the same by acquiring a tax deed thereon?

Counties have no inherent power, but derive their powers wholly from the sovereign state (*Amos v. Mathews*, 99 Fla. 1, 126

So. 308, text 321). The general governing board of the county is the board of county commissioners (§§5, 6 and 7, Art. VIII, State Const.). They are constitutional officers (*State v. Walton County*, 93 Fla. 796, 112 So. 630, text 632; *White v. Crandon*, 116 Fla. 162, 156 So. 303, text 305, *State v. Culbreath*, 128 Fla. 210, 174 So. 422, text 423) whose powers and duties are fixed by statute or the constitution, and they have such powers and duties only as are conferred on them by the state constitution and statutes (*Stephens v. Futch*, 73 Fla. 708, 74 So. 805, text 806; *State v. Culbreath*, supra; *White v. Crandon*, supra; *State v. Ausley*, 116 Fla. 762, 156 So. 909, text 910; *Gessner v. Del-Air Corp.*, 154 Fla. 829, 17 So. 2d 522; *Crandon v. Hazlett*, 157 Fla. 574, 26 So. 2d 638, text 642; *Colen v. Sunhaven Homes, Inc.*, Fla. App., 98 So. 2d 501, text 503). "They have no powers other than those expressly vested in them by (the constitution or) statute, or that must be necessarily implied to carry into effect the powers thus expressly vested" (*Crandon v. Hazlett*, supra). Moreover, where "there is doubt as to the existence of authority, it should not be assumed" (*Hopkins v. Special Road and Bridge Dist.*, 73 Fla. 247, 74 So. 310, text 311; *White v. Crandon*, supra; *Gessner v. Del-Air Corp.*, supra).

We find in the Florida constitution and statutes no express authority for boards of county commissioners to purchase and deal in tax sale certificates and liens, other than those bid off for the county at the delinquent tax sales as is provided by statute. (See §§194.47, 194.51, 194.55 and 194.57, F. S.). Nowhere in the statutes or constitution of this state are the boards of county commissioners given any specific authority to deal in tax sale certificates which have been purchased at the delinquent tax sale by others. There being no express power given to the boards of county commissioners to deal in tax sale certificates purchased by others at delinquent tax sales, we come now to the question of their purchase and enforcement of such tax sale certificates in connection with any of their express powers. Where a board of county commissioners must acquire real property for road, highway, building or other purposes, it may be that they would be permitted to purchase tax liens encumbering such real property as a part of their acquisition costs, but not as investments. It also seems that a state or county may acquire donations, gifts, devises of property to be used, either directly or indirectly, for public purposes (20 C. J. S. 995 and 996 §166; 14 Am. Jur. 207, §35). Under this rule it may be that a county might receive a tax sale certificate as a donation or gift, the proceeds to be received from its redemption or enforcement to be used for some county or public purpose, and enforce it by foreclosure or a tax deed sale as provided by law.

Generally, the above question must be answered in the negative, unless its acquisition is by donation, gift or devise for some county or public purpose, or is acquired in connection with the acquisition of the property encumbered for some public purpose, as a road or highway right-of-way or county building site.

061-179—November 2, 1961

TAXATION
TAX STATUS OF LAKE BOTTOM IN AREAS SUBDIVIDED
FOR BUILDING LOTS AND SUBSEQUENTLY CONVEYED
TO COUNTY

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where a subdivider of real property embracing certain non-navigable small lakes, for residential purposes, subdivides the area into lots and blocks, omitting from such lots and blocks the lake areas, and subsequently after the sale of most of the said lots, or a large part thereof, conveys the lake areas to the county, what is the tax status of said lake areas?

For the purpose of this opinion we have presumed, not being otherwise advised, that the lakes in question are non-navigable and were included in determining the area of the lands sold by the government or by the state to the predecessors of the title vesting in the subdivider and passed to and became vested in the subdivider prior to the subdivision of the said land and the sale of the lots and blocks therein; that the record title to the lake areas was included in a deed of conveyance from the subdivider to the county. We are not advised whether the subdivider used the lake areas as an incentive to encourage the purchase of the lots in the subdivision, in which case such incentive may well have brought the transaction within the purview of *McCorquodale v. Keyton, Fla.*, 63 So. 2d 906, text 910, where the court said that:

Whenever the owner of a tract of land subdivides the same into lots and blocks, lays off streets and other public ways and designates portions of said lands to be parks, playgrounds or similar facilities or uses similar words calculated to encourage prospective purchasers to buy said lots, and actually sells lots with reference to the plat, he becomes bound to his grantees by the plat and the representations thereon. As the maker of the plat and the one who selects the words used thereon it will be construed against him. Common honesty requires that he perform that which at the time of conveyance he represented he would perform.

* * * *

To summarize, we hold that when *McCorquodale* and wife, *Mary Emma McCorquodale*, platted the land as they did, recorded the plat with the dedication thereon and the symbols "Sunnyside park" on the land in question and sold lots according to the plat, the purchasers acquired by implied covenant, a private easement in said *Sunnyside park* as appurtenant to the premises granted and conveyed to them and that they thus became bound to the grantees not to use the land designated "*Sunnyside park*" other than as a park.

To the same general effect see also *Miami v. Florida East Cost R. R. Co.*, 79 Fla. 539, 84 So. 726, text 729; *Mumaw v. Robertson, Fla.*, 60 So. 2d 741; *Feig v. Graves, Fla. App.*, 100 So. 2d 192, text 195; and *Wilson v. Dunlap, Fla.*, 101 So. 2d 801, text 803 and 804; and 10 Fla. Jur. 27, §10.

Should it be found that the dedication proceedings evidenced by the subdivision plat evidences an intention to make of the said lakes recreation or park areas for the use and benefit of the lot owners, then there arose a right, in the nature of an easement, in such lot owners with the subdivider holding the title to such lakes in the nature of a trustee for the use of the lot owners. It was doubtless the intention of the subdivider to vest title in the county as successor trustee, and maybe also to classify the said lakes as public parks or areas subject however to the prior rights of the owners of lots in the subdivision.

Should the tax assessor find that our assumptions are true and correct, then the said lakes would be tax exempt as public parks and areas.

061-180—November 2, 1961

LICENSES AND LICENSE TAXES

NONPROFIT CORPORATIONS—EXEMPTION—TRAVELOGUE
MOTION PICTURES—§§205.01, 205.16-205.19, 205.32, 205.322
(CH. 61-273, LAWS OF FLORIDA) 205.33, 205.60,
205.61 AND 205.68, F. S.; §1, ART. IX, §16,
ART. XVI, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where shows, in the nature of travelogue motion pictures, are put on or sponsored by nonprofit corporations, the net proceeds therefrom being used for charitable purposes, are such shows exempt from license and license tax requirements and permits?

The Winter Haven Lions club was, about Oct. 7, 1961, incorporated as a nonprofit corporation, under the statutes and laws of this state, under the name of The Winter Haven Lions Club, Inc. Among the objects and purposes of this corporation, as expressed in article "II" of its charter, are the promotion and development of "a sound eyesight conservation program and other charitable activities for the benefit of the general public, and in particular the youth of our community, state and nation," and other like and similar purposes. We are advised, from the file furnished us with your request for opinion, that the said nonprofit corporation contemplates the presentation of several travelogue motion picture shows, including "Bolivia, Polynesia, Beautiful Hawaii, Germany, Austria and Romance of Kentucky, in the Winter Haven area during the coming winter season." The said nonprofit corporation will procure the putting on of the above shows by trained personnel who will put on the shows for the corporation for a fixed compensation.

The shows will be put on by the nonprofit corporation by and through such trained personnel. The said nonprofit corporation will in law put on the shows, through employees or contractees actually performing the plays; the corporation will handle such details as selling tickets, supply the ushers, rent the hall or theatre where the show will be put on, etc. Any net proceeds earned by the nonprofit corporation, after paying the actual costs and expenses incurred in putting on the show, will be used in carrying out the charitable purposes of the said Lions club, including eye care for the needy of the community, and elsewhere. We are here

concerned with the exempt status of the said nonprofit corporation, as a charitable institution actually performing charitable purposes, under the license tax laws and statutes of the state.

Exemptions from license taxes will not be implied or presumed, but must be clearly expressed in constitutional or statutory provisions, which must be strictly construed against the person claiming the exemption and in favor of the taxing authority (53 C. J. S. 603, §31; 33 Am. Jur. 363 and 364, §38; 21 Fla. Jur. 12 and 14, §4). Section 205.01, F. S., provides that "no person (person, firm, partnership, corporation, etc., see §205.68, F. S.) shall engage in or manage any business, profession or occupation for which an occupational license tax is required . . . unless a state license, or a state and county license, or a county license, as the case may be, shall have been procured . . ." Although exemption from license taxes is provided for certain cripples, invalids, widows, persons over 65, disabled war veterans, farmers and growers who sell their own products produced by them, those practicing their religious tenets, etc. (§§205.15, 205.16, 205.161, 205.17, 205.18, 205.19, and other sections of the Florida Statutes), we find no constitutional or statutory provision exempting nonprofit corporations from the license tax statutes, unless they be within the purview of §§ 1 and 16, of Art. IX and XVI, State Const., exempting property "held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes," from taxation. These sections have been held applicable to ad valorem taxes and not to license or excise taxes (*Miami Beach College Corp. v. Tomlinson*, 143 Fla. 57, 196 So. 608, text 609; see also *Jackson v. Neff*, 64 Fla. 326, 60 So. 350; *Gray v. Central Fla. Lbr. Co.*, 104 Fla. 446, 140 So. 320; *State v. Coleman*, 122 Fla. 434, 165 So. 509, and *Florida Sugar Dist., Inc. v. Wood*, 135 Fla. 126, 184 So. 614). In the latter cases certain provisions of said §§ 1 and 16, Art. IX and XVI, were held inapplicable to license taxes, but applicable to ad valorem taxes.

Sections 205.32, 205.321, 205.33, 205.60 and 205.61, F. S., require licenses and license taxes of those putting on the shows therein mentioned. We find no statutory provision exempting nonprofit corporations putting on travelogue motion picture shows when the net proceeds therefrom are being used or to be used for charitable and similar purposes, unless §205.61(4) be such an exemption. Said §205.61 imposed license taxes upon theatrical shows, traveling players and minstrels, traveling motion picture shows, traveling troupes, theatrical, operatic or minstrel, or moving picture shows, when put on under the circumstances therein specified. Section 205.61(4), provides that said section shall not apply "to any hall owned or used by any charitable or fraternal organization giving performances or exhibitions for their own benefit." *We are of the opinion that said subsection (4) was intended by the legislature as an exemption from license taxes under §205.61, as to those within its purview.*

Chapter 61-273 requires the procuring of permits by those engaged in the business of traveling shows, exhibitions and amusement enterprises where they conduct the same at a single location for less than thirty days. This permit is an adjunct to the licenses required by §§205.32, 205.321, 205.33, 205.60 and 205.61, F. S., and is an additional requirement. *We do not think that said Ch. 61-273 has any application to those persons entitled to exemption under §205.61(4), F. S. Where no license is required*

under said §205.61(4), no permit is required under said Ch. 61-273.

We have presumed, from the record before us, that the travelogue motion picture shows are to be put on by the Winter Haven Lions Club, Inc., a nonprofit corporation, and not by others, with the club paying a fixed compensation to those owning or controlling the film or films from which the shows will be produced, and in law putting on the show itself for its own account. The correctness of this presumption should be verified by the tax collector.

These observations answer the above question as well as the same may here be answered.

061-181—November 13, 1961

**STATE AND COUNTY OFFICERS AND EMPLOYEES
RETIREMENT SYSTEM—EMPLOYEES OF CITRUS ADMINIS-
TRATIVE COMMITTEE—§§601.152(5), (14)-(16), 122.02,
F. S.**

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Are the employees of the administrative committee of citrus producers, selected pursuant to §601.152, F. S., employees of the Florida citrus commission and members of the state and county officers and employees' retirement system?

Section 601.152(5), F. S., as added by Ch. 61-87, authorizes the selection by the Florida citrus commission of "an administrative committee of producers to assist the commission in the administration of any marketing order No member of such administrative committee shall receive a salary, but each shall be entitled to his actual expenses incurred while engaged in performing his duties." The compensation of the committee members not being "specified in terms of fixed monthly salaries" as required in §122.02, F. S., they do not appear to be within the purview of Ch. 122, F. S., the state and county officers and employees retirement system.

It is further provided in and by said §601.152(5), that the citrus "commission *may employ* or may authorize such administrative committee of producers to employ, necessary personnel, including professional and technical services, fix their compensation and terms of employment, and may incur or may authorize such administrative committee to incur such expenses, *to be paid by the commission from moneys collected as hereinafter provided*, as the commission may deem necessary and proper to enable such administrative committee or any advisory committee properly to perform such of its duties as are authorized herein." Whether the citrus commission employs, or authorizes the administrative committee to employ, personnel to assist the said committee, such employees would seem to be employees of the commission itself, employed by the commission itself or by its authorized agent.

Funds for the payment of the expenses incurred by the citrus commission, including the payment of personnel as aforesaid, are to be raised, through assessments made by the commission under and pursuant to §601.152(14), (15) and (16). These assessments are determined by prorating the expenses of administering said §601.152 among the growers and producers. The funds produced by such assessments are deposited by the citrus commission, for its

account, in a "special fund to be known as the Florida citrus stabilization fund in a bank or banks to be approved by the comptroller of Florida and paid out upon warrant of the commission for the actual expenses incurred by the commission or its committee or committees." Unused funds not necessary for further enforcement may be refunded to growers and producers as provided in said statute.

Section §122.02(1), F. S., defines "state and county officers and employees" as used in Ch. 122, F. S., as those "who receive compensation for employment or service from any agency, branch, department, institution, or board of the state, or any county of the state for service rendered the state or county from funds from any source provided for their employment or service regardless of whether the same is paid by state or county warrant or not; provided that such compensation in whatever form paid *shall be specified in fixed monthly salaries* by the employing state or county agency"

The said Florida citrus stabilization fund and the purposes and use thereof, bear a close relation to the purposes and use of the Florida citrus advertising fund, although the advertising fund is deposited in the state treasury instead of in some banking institution. The purpose and use of both such funds is the betterment of the citrus industry and of citrus growers and producers, and not for governmental operation in the usual sense. There is little, if any, real distinction between personnel employed under and pursuant to said §601.152, and other employees of the commission as state employees.

The above question is, therefore, answered in the affirmative.

061-182—November 13, 1961

REAL PROPERTY

ESTATES BY THE ENTIRETIES—BOND OBLIGATION EXECUTED BY BOTH HUSBAND AND WIFE, EFFECT—

§§708.08, 708.10, 689.03-689.05, 693.01, F. S; §§1 AND 2, ART. XI, STATE CONST.

To: Jess Mathas, Clerk Circuit Court, DeLand

QUESTION:

May a husband and wife owning a parcel of real property, as an estate by the entireties, become surety upon the bond of another so as to bind the estate by the entireties?

"An estate by the entireties is the estate created at common law by a conveyance or devise of property to a husband and wife. In such a case the husband and wife, by reason of their legal unity by marriage, take the whole estate as a single person with the right of survivorship as an incident thereto, so that if one dies, the entire estate belongs to the other by virtue of the original title. It is predicated on the concept that husband and wife are one person in law." (17 Fla. Jur. 74, §16). One of the incidents of a tenancy by the entireties is that the property so held is not subject to execution to satisfy the debts of either of the parties individually (Winters v. Parks, Fla., 91 So. 2d 649, text 651; Meyer v. Foust, Fla., 83 So. 2d 847, text 848; Vaughn v. Mandis, Fla., 53 So. 2d 704; Ohio Butterine Co. v. Hargrave, 79 Fla. 458, 84 So. 376). Property held by a husband and wife, as an estate by the

entireties, may not be subjected to the debts and obligations of either the husband or of the wife separately (17 Fla. Jur. 78-80, §20). However, in *Stanley v. Powers*, 123 Fla. 359, 166 So. 843, a judgment in tort jointly against a husband and wife was held to be a lien on the interests of such husband and wife "in property held by them as tenants by the entireties and the property may be sold under execution issued on the judgment."

In 41 C. J. S. 475, §34, it is stated that "a judgment against both husband and wife is a general lien on the interests of both in the property held by them as tenants by entirety, and the property may be sold under execution issued on the judgment." To the same effect see also 26 Am. Jur. 711 and 712, §34, and annotations in 35 A.L.R. 155, and 89 A.L.R. 503 and 504. This seems to pose the question of the validity of a bond signed by a married woman upon her interests in an estate by entireties. A married woman's written obligation alone will not bind her interest in an estate by the entireties, nor will that of the husband bind his interest in an estate by the entireties. Doubtless a husband and wife by joint mortgage or similar instrument, duly executed and delivered pursuant to law, may bind or dispose of an estate by the entireties (17 Fla. Jur. 86-88, §27). However, may the husband and wife, by the execution of a promissory note or bond, making no reference to the property held as an estate by the entireties, bind such property for the payment of the note or bond obligation?

Sections 708.08, 708.09 and 708.10, F. S., which originated as Ch. 21932, 1943, appears to have been intended an emancipation of married women, as to their right to contract, to the extent permitted by the Florida constitution. Although the property held by a husband and wife, as an estate by the entireties, is not the separate property of either, the *"interest or property rights which a married woman has in an estate by the entireties held by her and her husband during his life is her separate property"*, under the comprehensive provisions of §1, Art. XI, State Const.; and the interest the husband has in such an estate is his property." This separate interest of the husband and wife would seem to be nothing more than an expectancy of future acquisition of the entire title upon the death of one before the other. In *Newman v. Equitable Life Assurance Society*, 119 Fla. 641, 160 So. 745, text 748, it is stated that "the husband and wife together, owning the entire interest or property rights in an estate by the entireties, may convey or mortgage such estate in the manner stated in §1, article XI, of the constitution, and sections" 689.03, 689.04, 689.05 and 693.01, F. S. Under §1, Art. XI, State Const., the separate property of a wife "shall not be liable for the debts of her husband without her consent given by instrument in writing executed according to the law respecting conveyances by married women." Under §2 of said Art. XI, the separate property of a married woman may be charged (1) only for its purchase price, (2) its improvement with her knowledge and consent, and (3) or "for money or thing due upon any agreement made by her in writing for the benefit of her separate property."

Sections 708.08, 708.09 and 708.10, F. S., adopted by Ch. 21932, 1943, for the emancipating of married women, as to their right to contract, must be read and construed in the light of said §§1 and 2, Art XI, State Const. Even these statutes granting the right of contract to married women in broad terms, provides that "no

deed, mortgage or other instrument conveying or encumbering real property owned by a married woman shall be valid without the joinder of her husband. Although the husband is under no limitations as to his liability as a surety on a note or bond, his wife, when signing such an instrument as a surety, would seem to be under the limitations of §§1 and 2, Art. XI, State Const. A surety obligation would not ordinarily be one for the purchase price of an estate by the entireties or the separate estate of the wife, or its improvement; therefore, may it be said to be "for money or thing due upon an agreement made by her in writing, for the benefit of her separate estate," so as to bring it within the purview of §2, Art. XI, State Const. necessary to charge her separate estate.

In the light of these authorities for a married woman's interest in real estate held by her and her husband as an estate by the entireties, as well as her separate estate, to be bound under her obligation as a surety on a promissory note or bond there must be more than a mere signing of the note or bond, but there must be a written agreement signed by her husband and herself obligating such property for the payment thereof, otherwise it is doubted that there would be an enforceable obligation.

061-183—November 14, 1961

**REGULATION OF VOCATIONS AND PROFESSIONS
APPOINTMENT OF INVESTIGATORS BY BOARD OF MEDICAL EXAMINERS—IMMUNITY FROM PUBLIC SUIT—
LIABILITY INSURANCE—§§458.001, 458.041, F. S.; §22,
ART. III, §4, ART. IX, STATE CONST.**

To: *Homer L. Pearson, Director, State Board of Medical Examiners, Miami*

QUESTIONS:

1. Can the state board of medical examiners appoint or employ practicing medical doctors as investigators?
2. Are employees of the state board of medical examiners, when engaged in their duties, immune from public liability, and, if so, what is the nature and extent of such immunity?
3. Does the state board of medical examiners have authority to purchase liability insurance?

AS TO QUESTION 1:

The purpose of the medical practice act is to insure that the practice of medicine is controlled and regulated "to the end that the public shall be properly protected against unprofessional, improper, unauthorized and unqualified practice of medicine and from unprofessional conduct by persons licensed to practice medicine." (§458.001, F. S.). The state board of medical examiners is expressly empowered to appoint or employ personnel including investigators to assist the board in the performance of its duties. Such personnel need not be licensed physicians or members of the said board. (§458.041, F. S.)

The practice of medicine is a learned profession. A layman may not be qualified in all cases to ascertain whether the physician has breached his professional responsibilities. Protection to the public as well as fairness to an individual physician may dictate that he be investigated by another physician who understands the

intricacies of the practice of medicine. In recognition of this the legislature has given the medical board discretion to employ investigators who may or may not be licensed physicians or members of the board. Accordingly, question 1 is answered in the affirmative.

AS TO QUESTION 2:

Neither the state nor any of its agencies is liable in tort and may not be sued in tort in absence of express legislation authorizing such a suit (§22, Art. III, State Const.). The state board of medical examiners is a state agency, and as such is clothed with the same degree of immunity from suit as is the state. There is no Florida statute which waives the immunity of the state board of medical examiners as a state agency. This is in response to your question generally. However, one who is aggrieved or disgruntled can of course file suit against the board collectively, or against board members or its employees individually as there is nothing to prohibit one from instituting a legal proceeding. I am sure, however, that you are primarily concerned with the possibility of a person actually recovering a judgment as distinguished from the filing of such a suit. As was pointed out in AGO 058-99, the doctrine of sovereign immunity would be of little consequence if state officers and employees were subject to suit for their actions taken within their statutory authority. The liability of state officers has been stated in 1 Fla. Juris., Adm. Law, §236 as follows:

It has been held that when an administrative officer acts within the scope of his jurisdiction or authority he is not responsible unless he acts from a corrupt motive, even though he misconstrues the law and acts erroneously.

Moreover, the Florida courts appear committed to the proposition that a state employee is not personally liable for acts performed in the course of his employment unless he acted with malice or from a want of probable cause. *Wilson v. O'Neal*, Fla. App., 118 So. 2d 101. Your question is answered accordingly.

AS TO QUESTION 3:

Section 4, Art. IX, State Const., provides:

No money shall be drawn from the treasury except in pursuance of appropriations made by law.

The Florida state board of medical examiners does not have statutory authority to purchase liability insurance for its agents and employees. This office has consistently advised (AGO 058-99, 060-81) that state agencies may not purchase such liability insurance in absence of specific statutory authority. Accordingly, question 3 is answered in the negative.

061-184—November 14, 1961

CRIMINAL PROCEDURE

FEEES OF COUNTY JUDGES IN CRIMINAL CASES—FEEES IN PROCEEDINGS TO KEEP THE PEACE—§§36.18-36.21, 37.21, 939.16, F. S.

To: *Bryan Willis, State Auditor, Tallahassee*

QUESTIONS:

1. Are flat fees of county judges in criminal cases, in counties having populations of more than 175,000 governed by §36.18, or §36.20, F. S.?

2. Is a proceeding under §37.21, F. S., to keep the peace, a civil or a criminal proceeding for the purpose of determining fees and commissions?

3. Are proceedings to keep the peace, under §37.21, F. S., within the purview of §939.16, F. S.?

4. In such proceedings who pays the costs when the defendant is released, and when the defendant is bonded or committed?

Section 36.18, F. S., provides for fees and commissions of county judges, in civil, criminal and insanity proceedings in those counties having a population of more than 175,000 according to the last federal or state census. This statute was derived from Ch. 19633, 1939. Section 36.20, F. S., was derived from §§4 and 5, Ch. 25070, 1949, and provides the fees and commissions of county judges in criminal cases. Section 36.19, which was also derived from said Ch. 25070, provides the fees of county judges in civil actions. Said §36.20 is not limited in its operation to any specified population or population of counties. Sections 36.19, 36.20 and 36.21, appear to supersede and replace the major portions, if not all, of §36.18. County judges' fees in criminal cases in all counties are governed by §36.20, and not by §36.18, F. S., in counties having a population of more than 175,000.

Question 2 goes to the nature of a proceeding to keep the peace; whether a civil or criminal action or proceeding. Proceedings to keep the peace are in the nature of preventative justice and consist in obliging persons, where there is probable ground to suspect their future misbehavior, to give full assurance to the public, underwritten by their bond with sureties, that they will keep the peace (see 8 Am. Jur. 842, §19). The authorities seem to generally hold that "strictly speaking, proceedings requiring the giving of a peace bond are not criminal, although they are more in the nature of criminal than civil proceedings" (11 C. J. S. 826, §17, notes 18 and 19). Peace bonds have been said to be analogous to a bail bond or recognizance in a criminal case where the defendant is bound over (Hall v. Browning, 71 Ga. App. 835, 32 S. E. 2d 424, text 427). Such proceedings have also been referred to as quasi-criminal proceedings (State v. Scouszzio, 126 W. Va. 135, 27 SE 2d 451, text 453). Reference is also made to the authorities referred to in 11 C. J. S. 826, §17, notes 18 and 19, and 9 C. J. 393, §21, note 19, supporting the above conclusions.

Question 3 goes to the application of §939.16, F. S., to proceedings to keep the peace. This section provides that "in all cases justices of the peace and county judges in this state shall require payment in advance or security for costs of process, service of same, and of examination, unless the party applying for a warrant" shall make an affidavit of insolvency and substantial injury. Although proceedings to keep the peace are not strictly speaking either civil or criminal proceedings, but are quasi-criminal in nature, they appear to be within the purview of said §939.16, which section should be complied with in such proceedings to keep the peace.

Question 4 goes to the question of costs. Proceedings to keep the peace are usually instituted upon the filing of an affidavit by the complaining witness, upon which the court issues a warrant for the taking of the accused in custody, pursuant to which the accused is given a hearing upon the charges made against him; and should, from the hearing, the court determine that there is good reason to think that the accused may commit a breach of the peace, he should make and enter an order so finding and directing that the accused make bail to keep the peace. If the bail is not made, the accused should be committed to jail until the required

bond is made. Although the proceeding is not strictly speaking a criminal case, it is a proceeding in the nature of a criminal case, so that costs should follow the judgment in the usual way. Such judgments for costs should be enforced by execution in the usual way.

The above stated questions are answered as follows:

1. Flat fees in criminal cases are governed by §36.20, said section being in conflict with §36.18, and the subsequent law.

2. Proceedings under §37.21, although not strictly either civil or criminal proceedings, are quasi-criminal proceedings and should be deemed criminal proceedings for purposes of costs and commissions.

3. Proceedings under §37.21, are proceedings within the purview of §939.16, for the purposes of security for costs.

4. Proceedings under §37.21, are such proceedings that costs should follow the judgment in the case, unless an affidavit of insolvency has been made by the complaining witness and accepted by the judge.

061-185—November 15, 1961

CITIES AND TOWNS

INACTIVE MUNICIPAL CORPORATIONS—REACTIVATION

PROCEDURE—CHS. 10953, 1925; 11655, 1925; 13156, 1927;

§§165.01, 165.26 ET SEQ., F. S.; §27, ART. III, §7, ART.

IV, §§6 AND 7, ART. XVIII, STATE CONST.

To: J. U. Gillespie, Attorney at Law, New Smyrna Beach

QUESTION:

May a municipal corporation, with a legislative charter which has been inactive since about 1930 and whose officers are all deceased, be reactivated, and if so, what procedure should be followed?

Your request for opinion involves the town of Oak Hill, in Volusia county, which ceased to function as a municipal corporation around July 1930, but has not been formally dissolved by legislative action or otherwise. We are here concerned with the question of the means and methods for reactivating the town.

So far as we have been able to ascertain, the first legislative action in connection with this town was Ch. 10953, 1925, which chapter purported to create and establish a municipality to be known and designated as the town of Oak Hill, in Volusia county. Section 2, Art. I, of this act, provides in part that "the people of the town of Oak Hill as its limits now or may be hereafter defined, shall continue to be a body politic and incorporated by the name of the town of Oak Hill; . . ." (Emphasis supplied.) This indicates that a town by the same name may have previously existed under the general laws. The legislature, by Ch. 11655, 1925 (extraordinary session) again abolished the town of Oak Hill and reestablished the same under the same name. Again the legislature, by Ch. 13156, 1927, abolished the existing town of Oak Hill and reestablished the same under the same name. Under §5, Ch. 13156, the town of Oak Hill was given perpetual existence. Under §16, Ch. 13156, single vacancies in the office of municipal commissioner may be filled by the remaining commissioners, but where there is more than one vacancy "then an election shall be called to fill such vacancies" (§16, Ch. 13156). Sections 142 - 156 of said chap-

ter, provide for registration of voters and elections. Regular municipal elections are to be held on the first Tuesday after the first Monday in February, with the primaries being held in the preceding January. The town clerk is by statute made the town's registration officer of qualified electors. "Every person entitled to vote for members of the legislature, by the laws of the state, who is or will be twenty-one years of age, and who shall have resided in the town of Oak Hill for six months prior to the day of the election . . . shall be entitled to register" (§145 of said Ch. 13156). Elections are called and held pursuant to §§150, et seq., of said Ch. 13156. We find no other or further legislation relative to the municipality.

In your letter of Nov. 1, you advise that no meeting of the town's commissioners was ever held after July 2, 1930, and that at the present time, no living town commissioner, clerk, or other former officer of the town exist, all having died, and no successors have been elected or appointed. There is now no town commissioner or commissioners and no town clerk or other officer. We also presume that there is no existing usable list of qualified municipal electors. There is no existing municipal officer authorized to open registration books and register duly qualified electors of the town, or to hold an election of officers, even though a qualified list of electors may exist. There is no provision in Ch. 13156 for the reorganization of the town after its becoming dormant by non-use. So far as we are advised, there has been no procedure under §§165.26, et seq., F. S., to surrender the corporate franchise of the town of Oak Hill.

"A municipal corporation ordinarily does not ipso facto become dissolved or discontinued or lose its existence by misuser or nonuser of its corporate powers, functions and franchises." (62 C. J. S. 230, §103; see also 37 Am. Jur. 639, §22, and 2 McQuillin on Municipal Corporations, 421 - 424, §§8.05 and 8.06). The nonuser of the charter powers of the town, as well as the failure to elect its officers, as required by applicable laws, did not effect its dissolution. Our problem is one of the reorganization of a dormant municipal corporation. The legislature may provide by statute for the appointment of municipal officers, or the filling of vacancies, by the governor (62 C. J. S. 744, 946, 1002, 1038 and 1055, §§390, 506, 543, 558 and 564; *State v. Couch*, 139 Fla. 353, 190 So. 723, text 731). However, so far as we are advised, there is no statute authorizing the governor to fill the vacancies in question. Section 27, Art. III, State Const., relating to the appointment of state and county officers by the governor, has no application to municipal officers (*State v. Couch*, supra, and *State v. Coleman*, 131 Fla. 892, 180 So. 357, text 360). "A municipal officer is neither a state nor county officer" (Opinion of Justices, 121 Fla. 157, 163 So. 410, text 411). We find no authority determining whether or not §7, Art. IV, State Const., has any application to municipal officers; it seems clear from the language used in §§6 and 7, Art. XVIII, State Const., relative to the filling of vacancies in office, that it relates only to state and county officers and not to municipal officers. We doubt that said §7, Art. IV, would authorize the filling of the above vacancies in office by the governor. We feel that this is correct notwithstanding the advisory opinions reported in 25 Fla. 426, 5 So. 613 and 120 Fla. 729, 163 So. 76, and *Simonton v. State*, 44 Fla. 289, 31 So. 821.

Where there are existing officers charged with the duty of calling an election and the holding of such election, for the purpose

of filling the vacancies in question, who neglected and refused to call such election, then doubtless a proceeding in mandamus would seem to lie to enforce the performance of such duty. There being no person or persons charged with the duty of calling and holding such an election, mandamus is not an adequate remedy for requiring the calling and holding of such an election leading toward the reactivation of the said town. The inadequacy of available legal remedies is a ground of equitable jurisdiction. One of the functions of equity courts is to afford a remedy where none exists at common law (12 Fla. Jur. 151 and 159, §§15 and 20). The existence of a legal remedy is not decisive, its adequacy must also be considered (12 Fla. Jur. 165, §25). In order to preclude the pursuit of equitable remedies, an available legal remedy must be plain, certain, prompt, speedy, sufficient, full and complete, practical and efficient (12 Fla. Jur. 168, §27).

In *Williams v. Keyes*, 135 Fla. 769, 186 So. 250, recall petitions had been filed against certain officers of the city of Miami, which petitions, the officials charged with the processing of the petition and providing for a recall election, refused and neglected to honor, to process and call the necessary election, whereupon interested parties filed their complaint in the equity court seeking to cause the recall election to be held. The lower court ascertained that it was "empowered as a court of general jurisdiction to itself call said election as provided in the charter of the said city," and proceeded to so do. In upholding the court's jurisdiction, the supreme court stated that "courts of equity do have power in proper cases to require that to be done which in law should be done; and any appropriate statutory or other means not violative of organic law may be utilized in requiring statutory duties to be performed by persons designated by the court itself or by statutes, as may be most appropriate to the complete exercise of the equity power when the constitution or a controlling statute is not violated." In this case the court applied the maxim that equity will not suffer a wrong to be without a remedy (see 30 C. J. S. 506 and 507, §105).

We have been unable to find a reported court opinion, or an opinion of the attorney general, holding that §7, Art. IV, State Const., authorizes the governor to fill vacancies in municipal offices, in the absence of a statute so providing. We entertain doubt that said §7, Art. IV, was intended to authorize such appointments. However, we are of the opinion that the circumstances related by you in your letter of Nov. 1 evidently bring it within the jurisdiction of a court of equity, which court, upon proper complaint, petition or otherwise, has jurisdiction to outline a proper procedure, including the giving of proper notice of hearing on such complaint or petition, the issuance of process and the service of the same, personally, by publication, or otherwise, upon as many of the registered voters who are freeholders living within the territorial limits of the municipality as may be possible (§165.01, F. S.). It would be advisable to bring at least a majority of such voters within the jurisdiction of the court in the suit. By way of suggestion, the petition or complaint, by a representative group and in the nature of a class suit, should be supported by a petition signed by a large portion of the residents of the area, a majority would seem advisable, indicating general support of the reorganization of the municipality.

Should the court grant the application for reorganization of the municipality, it would seem to have jurisdiction to make

provision for the registration of electors in the municipal area, including the appointment of a registration official. If the county registrar is able to furnish a list of those registered electors residing within the municipal area, the court might give consideration to the use of that list instead of causing a registration of electors to be made. The court may also make provision for the holding of an election of officials for the town, including the appointment of registration officials, the holding of election, the tabulation of votes and the determination of the result of the election. Once the officers provided by the municipal charter are provided, they would reorganize the town and direct its municipal operations.

These observations indicate an affirmative answer to the above question. The procedure is suggested as aforesaid.

061-186—December 1, 1961

LICENSE TAXES

HANDWRITING ANALYSIS BY MECHANICAL MEANS—LICENSE REQUIRED—§§205.41 and 205.411, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are persons who, for a charge, analyze handwriting, through the use of mechanical means, and advise their customers of their traits as indicated by such analysis, subject to a license tax, and if so, under what section of the statutes should they be licensed?

The above question should be answered in the affirmative upon the authority of our opinion of Nov. 4, 1953 (AGO 053-298), the same being published in 1953-1954 AGO, 282 and 283. License taxes should be imposed upon such persons under and pursuant to §205.41, F. S. Section 205.411, F. S., being applicable to "fortune-telling or any other pursuit for which a license is required by §205.41," F. S., should also be complied with as a condition to obtaining a license under said §205.41, F. S.

061-187—December 4, 1961

REGULATION OF PROFESSIONS AND VOCATIONS
SANITARIANS' REGISTRATION ACT—CONSTRUCTION OF
§ 491.07, F. S.

To: *B. G. Tennant, R.S., Secretary-Treasurer, Sanitarians' Registration Board, Warrington*

QUESTION:

If a person was qualified for registration under §491.07, F. S., known as the grandfather clause of the sanitarians' registration act, and failed to apply for registration on or before October 1, 1959, does the board have the authority to review each case, and if it shall determine that because of extenuating circumstances a person failed to apply, may such a person be registered under §491.07?

Section 491.07 F. S., enacted as §7 of Ch. 59-191, provides, among other things, as follows:

The board shall register as a sanitarian . . . any person who applies for such registration on or before Oc-

tober 1, 1959, and meets the qualifications for a sanitarian

This is to advise that I do not believe that any state regulatory agency has any authority or any implied discretionary powers (in the absence of specific authorization by the legislature) to make an administrative ruling, the provisions of which are in direct conflict with the provision of the statute on the same subject. To take any other position would have the effect of saying that a regulatory board can enact its own legislation, the provisions of law or the constitution to the contrary notwithstanding.

It is therefore my opinion that the sanitarians' registration board does not have any discretionary power to modify, change, revise, or dispense with the license requirements provided by statute. It is further my opinion that any person that failed to *timely* avail himself of registration under §491.07, supra, must comply with the license requirements of the law, the same as if he had not been qualified under the said section.

061-188—December 8, 1961

TAXATION

DOCUMENTARY STAMP TAXES—CONSTRUCTION OF §201.01, F. S., AS AMENDED BY CH. 61-278, LAWS OF FLORIDA

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Should the clerk of the circuit court, when a document subject to the proviso in §201.01, as amended by Ch. 61-278, refuse to record the same unless taxes due thereon under Ch. 201, F. S., have been paid "prior to recording"?

The proviso mentioned provides that "the documentary stamp taxes required under this chapter shall be affixed to and placed on all recordable instruments, requiring documentary stamps according to law, *prior to recordation*, on mortgages where the stamps are on the notes, a notation shall be made on the mortgage that the proper stamps and the amount of the same have been placed on the notes." The title to said Ch. 61-278, is "An act relating to taxation; amending §201.01, F. S., to provide the required documentary stamps to be placed on all recordable instruments *prior to recordation*." (Emphasis supplied.) There can be little doubt but that the legislative intent was that all recordable documents subject to documentary stamp taxes be properly stamped prior to being submitted for recordation. Mortgages being recordable instruments, the proviso requires that the required stamps be placed either on the mortgage or on the notes prior to being offered for record. Where the stamps are on the notes instead of the mortgage securing them, then proper notation of the stamping of the said notes, including the amount of stamps placed on the said notes, must be made on the mortgage prior to recording. This doubtless was intended to require that evidence of the payment of the stamp taxes due be made a matter of record when the mortgage is recorded. It would appear to be the duty of the recorder to see that recordable documents within the purview of said proviso bear documentary stamps, or the evidence required of stamping, as aforesaid, at the time they are recorded. The person offering such documents for record also has the duty of seeing to it that such documents bear the proper amount of taxes required.

In 45 Am. Jur. 451 and 452, §59, the statement is made that "the record does not give constructive notice unless the instrument is executed and authenticated with the formalities required by law in order to entitle it to record. The question whether there has been a sufficient compliance with the legal requirements depends, of course, on the provisions of the particular law under which the instrument is recorded." The statement is made in 59 C. J. S. 327, §261, that "The record of a defective mortgage or *one which is not entitled to record* does not constitute constructive notice to anyone, and, subject to statutory variations, subsequent purchasers, creditors or encumbrancers may not be charged with notice of such a mortgage, as where the mortgage is defective or not entitled to record" In 85 C. J. S. 688, §1082, we find the statement that "in general where a recording tax is payable in respect to a recordable instrument offered for record, the recording officer has no right to record such instrument if the tax is not paid, and under some statutes it is the duty of the recording officer to refuse to discharge a mortgage lien of record if the mortgage is subject to a recording tax and such tax has not been paid." In 45 Am. Jur. 454, §64, it is stated that "assuming the constitutionality of a statute that places a tax on a deed or mortgage and requires it to be paid before the deed or mortgage is entitled to record, the payment of the tax is a condition precedent to recordation, and an instrument on which the tax is not paid will not operate as constructive notice, although it is left in the proper office for recordation.

The question of constructive notice of an instrument within the purview of the proviso in §201.01, F. S., as added by Ch. 61-278, above discussed is a judicial matter to be finally determined by the courts. Our purpose in discussing the same here is to give notice of possible loss of constructive notice of the record of such a document without paying the required tax, and put those on notice of the possible effect of a failure to properly stamp such a document.

There is a reasonable chance that the failure to attach the required amount of document stamp taxes to the document may result in loss of constructive notice rights, at least until the proper amount of stamps have been attached. In order to protect his rights, it may be the duty of the owner and holder of a deed, mortgage or other document, within the recording laws of this state, to see to it that proper amount of stamp taxes are attached thereto prior to recording. The duty of a clerk of a circuit court to see to it that such taxes are paid prior to a recording of the document is an incidental and not a primary duty; his failure to require the proper amount of stamp taxes prior to recording will in no way protect the owner or holder of the document against the effects of a failure to attach proper stamps thereto. Although it is the duty of the clerk to see to it that the document is properly stamped before being recorded, that is a secondary and not a primary duty. The clerk is only required to make a reasonable effort to ascertain the tax due, not an all out effort. If the clerk later learns that he has been misinformed, he should notify the comptroller, giving full details concerning the question of taxes.

The above question is answered in the affirmative, subject to the above observations.

061-189—December 11, 1961

**REGULATION OF VOCATIONS AND PROFESSIONS
OSTEOPATHIC PHYSICIANS—CONSTRUCTION OF §459.19,
F. S., RELATING TO REFRESHER COURSES**

To: Dr. T. F. Sheffer, Secretary-Treasurer, Board of Osteopathic Medical Examiners, Ft. Lauderdale

QUESTION:

What constitutes satisfactory evidence of having completed an approved refresher course of postgraduate education within the purview of §459.19, F. S.?

Section 459.19, F. S., relates to renewal of licenses to practice osteopathic medicine and provides, among other things, that each license holder under Ch. 459 shall be required annually to attend a two-day refresher educational program approved by the state board of osteopathic medical examiners.

The conditions upon which the board shall approve such refresher educational programs are set forth in the said section.

Section 459.19(3) (a), supra, provides that the applicant for renewal of his license shall furnish to the board satisfactory evidence of having completed an approved refresher course of education.

In view of the foregoing, it is therefore my opinion that any refresher educational program must first be approved by the board. As to what shall constitute satisfactory evidence of attendance at such an approved course, lies within the discretion of the board to determine.

It is further my opinion that if any evidence should be presented to the board that is questionable, then it would be up to the board to investigate, and to either approve or disapprove the evidence submitted.

I trust the foregoing answers your question.

061-190—December 11, 1961

**CONDOMINIUMS
INSURABILITY UNDER FEDERAL HOUSING ACT—HOME-
STEAD TAX EXEMPTION; §7, ART. X, STATE CONST.**

*To: W. P. Wilcox, Director Federal Housing Administration,
Washington, D. C.*

QUESTIONS:

1. Do the laws of Florida meet the requirements of §234(a), of the national housing act, as added by §104 of the act of June 30, 1961, so as to permit the insuring by the federal housing administration commissioner of a mortgage on a single unit of a condominium?

2. May the owner of a single dwelling unit of a condominium who is otherwise fully qualified, avail himself with respect to said unit of the \$5,000 exemption from all taxation accorded pursuant to §7, Art. X, State Const.?

The above questions pose the issue of whether or not the laws of Florida recognize the condominium of real property ownership, as referred to in §234 of the national housing act, as added by §104, of the act of June 30, 1961 (87-70). Senate report 281, relative to the housing act of 1961, after making references to "condomin-

iums" states that "the condominium concept is similar to that of a cooperative, with the principal exception that the individual unit in a multifamily structure is owned by the occupant and can be separately encumbered by a mortgage (as well as separately conveyed). Each unit owner also owns a share in the common area and facilities of the building, such as the land, the foundations, halls, lobbies and stairways. The common area and facilities remain undivided and are not subject to division. The necessary maintenance of the property and use of the common facilities are governed by agreement between the individual owners of units in the building. The common profits and expenses of the building are distributed among the owners of individual units." For the purposes of this opinion we adopt the above definition of the condominium plan of real property ownership.

The purpose of §234, of the national housing act, as added by Ch. 87-70, federal acts, as therein stated, "is to provide an additional means of increasing the supply of privately owned dwelling units, under the laws of the state in which the property is located," under the condominium plan of ownership. The term "mortgage" as used in said section "may include a first mortgage given to secure the unpaid price of a fee simple interest in, or a long-term leasehold interest in, a one family unit in a multifamily structure and an undivided interest in the common areas and facilities which serve the structure . . ."

We appear to be confronted with the question of the nature of the right, title or interest vested in the holder of an instrument purporting to convey title to apartment in a multifamily apartment building, together with an undivided interest in the common areas and facilities which serve the structure and its occupants. The following authorities bear upon this question:

The statement is made in 2 Tiffany Real Property, 3rd ed. 624 and 625, §626, that "parts of a building may be owned by different persons in fee simple, as where an upper floor belongs to one person, and the lower to another, or separate rooms, or even parts of rooms, belong to different persons." In 16 Am. Jur. 443, §9, it is stated that "a person who owns the entire estate in real property may sell and convey any part of it. It may be divided *horizontally, perpendicularly, or in any manner according to the will of the owner*, even to the extent of granting a freehold interest in a part of a building, although conveyances of the latter kind, like leases of apartments in buildings, must be construed according to the intention of the parties and with reference to the subject matter upon which they operate . . ." In 26 C. J. S. 605, §15, the statement is made that a "grantor has the right to divide his holdings by horizontal planes or lateral lines."

It is stated in 1 Thompson on Real Property, Permanent Ed., 70, §63, citing Doe v. Burt, 1 Term Reports 701, text 703, that "in London different persons have different freeholds over the same spot; different parts of the same house are let to different people. That is the case in inns of court. Now, it would be very extraordinary to contend that if a person purchased a set of chambers, then leased them, and afterwards purchased another set under them, the after purchased chambers would pass under the lease." Like and similar expressions are found in Graciosa Oil Co. v. Santa Barbara County, 155 Cal. 140, 99 P. 483, text 486, 20 L. R. A. (NS) 211; Kidwell v. General Petroleum Corp., 212 Cal. 720, 300

P. 1, Text 4, 76 A. L. R. 830; Beulah Coal Mining Co. v. Heihm, 46 N. D. 646, 180 N. W. 787, text 789; Pifer v. Taylor, 48 N. D. 967, 188 N. W. 171, text 172; Harrington v. Watson, 11 Or. 143, 3 P. 173, text 175; Hahn v. Baker Lodge, 21 Or. 30, 27 P. 166, 13 L. R. A. 158, 28 Am. St. Rep. 723; Pearson v. Matheson, 102 S. C. 377, 86 S. E. 1063, text 164 and 165; Griffin v. Fairmont Coal Co., 59 W. Va. 480, 53 S. E. 24, text 27, 2 L. R. A. (NS) 1115; 1 Am. Law of Property, 198-202, §3.10; 4 Powell Real Property, 709 to 711, §§6 and 32; and Washburn on Real Property, §342.

From the above and foregoing it appears valid for the owner or owners of a multi-story apartment building to sell and convey to another an apartment on the second or upper story; however, the nature of that title presents a further question. An annotation in 13 L. R. A. 158 and 159 collects several state court decisions which seem to hold that such a sale of a part of a building conveys a mere easement. The statement is made in Hahn v. Baker Lodge, 21 Or. 30, 27 P. 166, 13 L. R. A. 158, text 160, that "it is not doubted that there may be a freehold interest in a part of a building, 1 Wash. Real Prop. 18." "At common law 'real property' was deemed coextensive with lands, tenements and hereditaments, corporeal and incorporeal; and in this country, both by statute and common law, the term is generally used for the phrase 'lands, tenements and hereditaments,' but 'real estate' and 'real property' are not strictly convertible terms . . . it must be understood that 'real property' is divided into three divisions, lands, tenements and hereditaments. . . ." (1 Thompson on Real Property, Perm. Ed., 65, §59). It was stated in Walters v. Sheffield, 75 Fla. 505, 78 So. 539, text 541, that "by the common law also several sorts of estates or interests, joint or several, may exist in the same fee; as that one person may own the ground or soil, another the structures thereon, another the minerals beneath the surface, and still another the trees and wood growing thereon." In this same case the statement is made that the "title to standing timber is an interest in the land." See 25 Fla. Jur. 509 and 510, §8, where the statement is made that the term "'tenement' is of greater extent than the word 'land.' In its most extensive signification, it comprehends everything that may be holden, provided it is of a permanent nature. 'Hereditaments' is the largest and most comprehensive word of the phrase 'lands, tenements and hereditaments.' It is almost as comprehensive as 'property' because it comprehends anything capable of being inherited . . ."

The court, in *Burdine v. Sewell*, 92 Fla. 375, 109 So. 648, text 652, and *J. C. Vereen & Sons v. Houser*, 123 Fla. 641, 167 So. 45, text 47, stated that "an easement, being an interest in land, can be created only by grant, the existence of which may be established by the production of a deed expressly declaring it, or may be inferred by construction from the terms and effect of an existing deed . . ." In *Winthrop v. Wadsworth*, Fla., 42 So. 2d 541, text 543, the court said that "easements over land may be created in three ways: First, by express grant, second, by implication, and third, by prescription." To the same effect, see also *Canell v. Arcola Housing Corp.*, Fla., 65 So. 2d 849, text 851. "A 'freehold estate' is an interest in real property, the duration of which is not fixed by a specified or certain period of time, but must, or at least may, last during the lifetime of some person. It is any estate of inheritance, or for life in any hereditament existing in or arising out of real property of fee tenure. . . ." (2 Thompson on Real Property,

Perm. Ed., 421, §730." "A fee existing in an easement is regarded as real property." (1 Thompson on Real Property. Perm. Ed., 528, §331). Permanent and perpetual easements have been recognized (28 C. J. S. 715 and 716, §51). They have been held to be freehold interests (28 C. J. S. 621, §1, note 16). Although perpetual *leases* are not favored in law, nevertheless where the intention to create one is clear and unambiguous, it will be deemed valid and enforceable (51 C. J. S. 606, §61).

From the above and foregoing we reach the conclusion that where by deed properly executed and delivered by the owners to a grantee conveying to him a specified and described apartment within a multiple-story apartment building in fee together with a proper share in the common areas and facilities of the building, such as the land, the foundations, halls, lobbies, stairways, and other common property, the common area and facilities remaining undivided and not subject to division, the said deed will convey an interest in real property within the statutes and laws of the state which may be mortgaged or otherwise dealt with. In this connection, title attorneys warn of the necessity that title agreements, papers and conveyances be carefully and correctly prepared, especially as to the rights of the apartment purchaser and his relation with other apartment owners and their relation with him. Such agreements should provide for necessary maintenance of the property, the use of common facilities, rights and interests in case of destruction of the apartment building, and all other common interests and rights. In the case of condominium titles as here contemplated, other rights, titles and interests, other than the rights, titles and interests in specific apartments, are involved and should be kept in mind and dealt with in the preparation of agreements, deeds and other documents in this connection. No attempt has been made here to do more than point out some general problems to be kept in mind in the preparation of agreements, deeds and other documents. In at least one instance coming to our attention the general agreement between all apartment owners was made a part of each deed conveying an apartment by reference. Any description of an apartment must be such that the apartment described may be clearly located and distinguished from all other apartments in the apartment building.

As to question 2, the cases of *Overstreet v. Tubin*, Fla., 53 So. 2d 913, and *Gautier v. State*, Fla. App., 127 So. 2d 683, establish the rule that each building, regardless of the number of apartments therein, constitutes a dwelling house, under §7, Art. X, State Const., and is entitled to only a total of \$5,000 of homestead tax exemption rights without regard to the number of residents therein. In *Overstreet v. Tubin*, a duplex owned by two separate homesteaders, making their permanent home therein, and owning separate apartments, was held by the supreme court to be limited to a total of \$5,000 in homestead tax exemptions. The same rule was followed by the district court of appeals, 3rd district, in *Gautier v. State*, supra. Each owner making his permanent residence in the apartment would be entitled to homestead tax exemption, which exemption would be limited to a total of \$5,000 for each building, not each apartment. Naturally, in large apartment buildings, this would be of little benefit.

061-191—December 15, 1961

TAXATION
INTANGIBLE PERSONAL PROPERTY TAXES—FOREIGN
INSURANCE CORPORATION—BUSINESS SITUS

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Where a foreign insurer domiciled in another state, establishes executive offices in this state, what portion, if any, of its intangible personal property may be taxed in this state in the county wherein said executive offices are located?

"In contemplation of law, intangible personal property acquires the person of the owner and is taxable at his domicile unless it has acquired a business situs for taxation purposes elsewhere" (State v. Gay, 160 Fla. 445, 35 So. 2d 403, text 408). (Emphasis supplied.) The general rule appears to be that "unless otherwise provided by law, intangible personal property is taxable at the domicile of its owner, except where such intangible personal property has, by its use, or otherwise, acquired a business situs for taxation purposes at another place" (Wood v. Ford, 148 Fla. 66, 3 So. 2d 490, text 495 and 496). The intangibles owned by the foreign insurer in question consists of numerous shares of stock, issued by numerous corporations, having a full cash value of about \$1,139,089.00 and negotiable bonds having a full cash value of about \$760,089.00, the evidence of said stocks and bonds being located in the county in the state, other than the State of Florida, wherein is located the home office of the said insurer. From these facts and statements of applicable law it appears that we are here primarily concerned with the question of whether such stocks and bonds, or any part thereof, have acquired a business situs within the State of Florida, by reason of the establishment of an executive office in this state, or otherwise.

We are advised, from a letter from the superintendent of insurance of the state wherein the home office of the said insurer is located, that the said insurer "is a domestic fire and casualty company incorporated under the laws of Ohio and maintaining its corporate offices at Dayton, Ohio. The corporate office of the insurance company must remain in Ohio so long as it is a domestic corporation and it must maintain corporate records, such as minutes of the regular and special meetings of stockholders, directors and other committees, stock records and securities among other things in Ohio at all times." The said superintendent of insurance further advises that he "would consider it an infraction of the law (of Ohio) if the ... (insurer) ... were to transfer its securities out of Ohio, except in those cases where it is required through state regulations to make reasonable deposits with the regulatory official of another state in order to do business therein."

The president of the insurer in question appears to have advised the tax assessor of the county wherein its executive offices are located in this state, that all securities held by the said insurer "must be deposited and kept within the confines of the state of Ohio at a designated location approved by the superintendent of insurance of the state of Ohio. When purchased the securities are shipped direct to the designated Ohio depository." That "in order to reduce operating and administrative expenses and take advantage of the

IBM installations and clerical help available in the Jacksonville office of the ... (a Florida life insurer) ... it requested approval from the superintendent of insurance of the state of Ohio to perform its administrative and official functions in the "Jacksonville office of (the Florida insurer). This permission was granted, but is subject to withdrawal at any time at the pleasure of the superintendent of insurance of Ohio. The ... (Florida insurer) is reimbursed by the ... (Ohio insurer) for its share of the expenses." In this connection the president of the Ohio insurer states that its "position in the state of Florida is the same as that in the other 46 states in which it is licensed, other than its home state of Ohio. The Florida insurance department supervises (the Ohio insurer's) activities only in the state of Florida; whereas, the Ohio insurance department supervises all the activities and operation of the company in all other states; and the insurance laws of Ohio are those basically governing the operations of" the said Ohio insurer.

We come next to the question of whether or not, because of the Ohio insurer's operation and business practices in Florida, the said stocks and bonds, or any of them, *have acquired a business situs in Florida*, separate and apart from its business operations in Ohio. It has been stated that "it is impossible to give a general rule as to what constitutes a business situs for the purposes of taxation of intangibles in a state other than the state of the owner's domicile, since such situs depends on various combinations of facts" (Annotations in 76 A.L.R. 807 and 143 A.L.R. 365). The following points have been considered and given some weight by the courts when determining whether a business situs has been established: (1) Localization or integration with business generally; (2) continuity or permanency of the business; (3) custody of the intangibles; (4) extent of authority of officers or agents at the business situs; (5) constitutional and statutory provisions bearing on the question.

In *Smith v. Lummus*, 149 Fla. 669, 6 So. 2d 625, the court, considering the question of business situs in connection with taxation, stated that "the exception to the rule that the tax on intangible personal property should be levied at the domicile of the owners arise in those cases where, because of activity in another state involving the property, they receive such benefits and protection under the laws of that state that they should make contributions to its government ... the taxpayer who is domiciled in one state but carries on business in another is subject to a tax there measured by the value of intangibles used in his business (transacted at the business situs)" *Officers, when taxing because business situs "go beyond the sphere of their authority if they assess and collect taxes on the debit balances when all, save certain mechanical activities with reference to them are, according to the allegations of the bill of complaint, controlled entirely from another state."* (Emphasis supplied.)

The answer to the question of the taxability or nontaxability of the stocks and bonds of the Ohio insurer, above described, depends upon the extent of the Florida operation of the corporation in this state. If the business carried on in Florida is chiefly executive, and not merely mechanical in nature, the intangibles in question, to the extent used in connection with the Florida operations, would seem to be subject to tax in Florida. However, if the activities carried on in Florida are largely mechanical and clerical, and not executive, there would seem to be no sufficient business situs in Florida to justify the Florida taxation of the said stocks and bonds.

The extent of the business carried on in Florida, whether executive or merely mechanical and clerical, must be determined from the facts and circumstances involved.

Certain evidence has come to our attention indicating that the Ohio insurer has established offices in this state, sometimes referred to as executive offices, the same being located in Jacksonville. This may raise a presumption that executive functions, instead of purely mechanical and clerical functions, are carried on at said office. However, this is at most a presumption and may be overcome by a showing that the office is not in fact such as will give the same a technical business situs. We do not have before us sufficient evidence, facts and circumstances from which the above stated question may be answered. However, if it should be determined that only mechanical and clerical functions are carried on at that office, under the supervision and control of the Ohio office, then no separate business situs would appear to have been established, justifying a taxation of the said stocks and bonds; however, should it appear that executive control is centered in the personnel of said Florida location so that the insurance business is, in fact, being carried on from the Florida location, then a business situs would appear to have been established in Florida. Should a business situs be found to have been established in Florida, then only the stock and bonds allocated to the business being carried on from such business situs may be taxed in Florida.

061-192—December 18, 1961

**AUTO TRANSPORTATION COMPANIES
CONSTRUCTION OF §323.15, F. S.—MUNICIPAL LICENSE
TAXES**

To: *Albert L. Weintraub, City Attorney, Opa-Locka*

QUESTION:

May a municipal corporation, in the light of the latter part of §323.15(2), F. S., impose a license tax against an auto transportation company duly qualified under Ch. 323, F. S.?

Section 323.15, F. S., imposes a mileage tax upon auto transportation companies qualified under Ch. 323, F. S., as therein provided; however, said §323.15(2), in the latter part thereof, provides that "the mileage tax provided for in this section *shall be in lieu of all other taxes and fees of every kind, character and description, state, county or municipal, including excise and license taxes levied or imposed against such auto transportation companies, or the operation of such business and facilities thereof, or their property, except ad valorem taxes levied upon the property, other than motor vehicles and motor vehicles of such auto transportation companies, and except the gasoline tax and motor vehicle fuel tax now or hereafter provided by law.*" Section 323.15, was first derived from §16, Ch. 14764, 1931, and the above quoted portion of said section has remained unchanged in substance since its enactment in 1931, although some change in language has been made. The provision appears to have first appeared as a part of §14, Ch. 13700, 1929, which appears to have been replaced by said Ch. 14764, 1931.

Tamiami Trail Tours, Inc. v. Orlando, Fla., 120 So. 2d 170, concerned an Orlando municipal ordinance requiring a carrier operating under Ch. 323, F. S., to recognize freight loading and un-

loading zones and obtain from the municipality a permit, for which a charge of \$10 was made for original issuance and an annual fee of \$1 was required for annual renewals. The court held such charges to be violative of said §323.15, as to the said charges for the permit. In *Mercury Cab Owners Ass'n v. Miami Beach Air Transport, Inc.*, Fla., 77 So. 2d 837, it was held that a carrier operating under said Ch. 323, F. S., could not be required to obtain a similar certificate from the city of Miami Beach.

In the first above mentioned case the court said that the ordinance there in question "is naught but an attempt to impose an excise tax upon petitioners and others similarly situated, either for the purpose of using the city's freight zones or upon the operation of their business within the city." This it obviously cannot do, under the express provisions of Ch. 323, F. S.

The above decisions of the Florida supreme court seem to be conclusive of the above question, and answer the same in the negative, unless, of course, there is a provision in the municipal charter, subsequently enacted by the legislature, which is clearly in conflict with said §323.15, and was intended to establish an adverse rule in your municipality.

061-193—December 18, 1961

TAXATION

INTANGIBLE PROPERTY—CAPITAL STOCK ISSUED BY
NATIONAL MORTGAGE ASSOCIATION—§199.01, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are the shares of stock issued by the National Mortgage Ass'n, under §1718, title 12, of the U. S. code, to capital contributors as therein provided, subject to taxation as intangible personal property in this state when held by a citizen or resident of this state?

Under §1718, title 12, of the U. S. code, relating to the capitalization of the National Mortgage Ass'n, it is provided that "the association shall accumulate funds for its capital surplus account from private sources by requiring each mortgage seller to make payments of nonrefundable capital contributions equal to two per centum of the unpaid principal amounts of mortgage purchased or to be purchased by the association from such seller The association shall issue, from time to time, to each mortgage seller its common stock (only in denominations of \$100 or multiples thereof) evidencing any capital contributions made by such seller" The said section further makes provision for the payment of dividends upon stock so issued, at the discretion of the board of directors of the association. Such stock appears to be within the definition of intangible personal property as defined in §199.01, F. S., and subject to taxation thereunder unless immune from taxation.

In *Maricopa County v. Valley Nat'l Bank*, 318 U. S. 357, 63 S. Ct. 587, 87 L. ed 834, text 837, the court held that no power to tax shares of stock in national banking institutions was reserved to the states by the federal constitution; that such power to tax depends only upon the consent of the federal congress. Without the consent of congress, shares of stock in national banks held by persons, firms and corporations may not be taxed by a state (84 C.J.S. 297, §153). In *Maricopa County v. Valley Nat'l Bank*, supra, the

court remarked that the federal congress "has under the constitution exclusive authority to determine whether and to what extent its instrumentalities . . . shall be immune from taxation." In *Farmers and Mechanics Savings Bank v. Minnesota*, 232 U. S. 516, 34 S. Ct. 354, 58 L. ed. 706, the court held that a state may not tax bonds issued by a municipal corporation of a territory of the U. S., without the consent of the federal government itself or through the territorial legislature. Such bonds were deemed instrumentalities of the federal government taxable only after consent to tax is given. In *Roberts v. Amer. Nat'l Bank*, 94 Fla. 427, 121 So. 554, text 556, the Florida court stated that "the shares in a national banking association cannot be taxed under state authority except as congress consents, and then only in conformity with the restrictions attached to such consent."

We see little, if any, real distinction between national banks and the National Mortgage Ass'n, with regard to the state taxation of shares of stock issued by them; therefore, we feel that the rule applied to shares of stock issued by national banks, with regard to state taxation, is likewise applicable to shares of stock issued by national mortgage associations. Finding no statutory authority by congress authorizing the taxation of shares of stock issued by the National Mortgage Ass'n (see subsection "c" of §1723, title 12, U. S. code), the above stated question is answered in the negative.

061-194—December 18, 1961

CRIMES

VAGRANCY—CONSTRUCTION OF §§856.02 and 856.03, F. S., AS RELATING TO PERSONS SEVENTEEN YEARS OF AGE

To: *Edward M. Booth, County Solicitor, Jacksonville*

QUESTION:

Does the vagrancy statute, §856.02, F. S., apply to persons who are 17 years of age?

Section 856.02, F. S., reads as follows:

856.02 Vagrants. — Rogues and vagabonds, idle or dissolute persons who go about begging, common gamblers, persons who use juggling, or unlawful games or plays, common pipers and fiddlers, common drunkards, common night walkers, thieves, pilferers, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons who neglect their calling or employment, or are without reasonably continuous employment or regular income and who have not sufficient property to sustain them, and mispend what they earn without providing for themselves or the support of their families, persons wandering or strolling around from place to place without any lawful purpose or object, habitual loafers, idle and disorderly persons, persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses or tippling shops, persons able to work but habitually living upon the earnings of their wives or minor children, and all able bodied male persons over the age of eighteen years who are without means of support and remain in idleness, shall be deemed vagrants, and upon conviction

shall be subject to the penalty provided in §856.03. (Emphasis supplied.)

Said statute clearly provides that persons falling within a number of different categories shall be deemed vagrants, among them being common night walkers, lewd, wanton and lascivious persons, and persons wandering or strolling around from place to place without any lawful purpose or object. A seventeen-year old person comes within every category mentioned in the statute except the last one, which the statute describes as follows: "... and all able bodied male persons over the age of eighteen years who are without means of support and remain in idleness ..." The words "over the age of eighteen years," apply only to said last described category.

The views expressed above are in accord with the following pronouncement of the supreme court of Florida in *Rodriguez v. Culbreath*, 66 So. 2d 58, 59:

Section 856.02, when read with §856.03, F. S. 1951, F.S.A., shows conclusively that it was intended to cover and punish the different classes of vagrants named in the act or known to the law at the time it was enacted. ... (Emphasis supplied.)

and with the following pronouncement of the district court of appeal for the 2nd district in *Rinehart v. State*, 114 So. 2d 487, 488:

Section 856.02, F. S., F. S. A., lists a number of persons who shall be deemed vagrants, one classification being "persons wandering or strolling around from place to place without any lawful purpose or object." ... (Emphasis supplied.)

Therefore, your question is answered in the affirmative except, however, that said §856.02 does not apply to an able-bodied male person who is without means of support and remains in idleness unless such person is over the age of 18 years.

061-195—December 19, 1961

TAXATION

SITUS OF TANGIBLE PERSONAL PROPERTY FOR PURPOSE OF AD VALOREM TAXATION—§200.09, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Where is the situs of tangible personal property for purposes of taxation?

It appears from your file, handed us with your request for opinion, that a road contractor engaged in the construction of an interstate road project in this state, was so engaged in one of the counties of the state on Jan. 1, 1961, and on said day had a considerable amount of construction machinery and equipment in said county being used in such construction project. The said contractor, a Florida corporation, was domiciled and had its principal place of business in another county. The said construction machinery and equipment, being used in the county where the construction work was being carried on, was assessed for ad valorem taxes in said county for the tax year of 1961; however, the same property was included in an assessment made in the home county of the contractor for the same tax year. Although the file before

us seems to concern itself with the right of the tax assessor of the county wherein the work was being performed to assess the said property in that county for the said tax year of 1961, the actual question seems to be in which of such counties did the property in question have its situs for purposes of ad valorem taxes on Jan. 1, 1961.

We find no provision in the Florida Statutes specifically defining the situs of taxation under circumstances such as we are here concerned. In effect, §200.09, F. S., requires that tangible personal property be returned in the county wherein it has its situs for purposes of taxation. "The general rule is that the situs of personal property for purposes of taxation is primarily at the domicile of the owner, subject to certain exceptions, such as the acquisition of a fixed situs different from that of the owner." (*Harkness v. Seaboard Air Line Railway*, 99 Fla. 1027, 128 So. 264, text 265; *Atlantic Coast Line Railroad Co. v. Amos*, 94 Fla. 588, 115 So. 315, text 320; 51 Am. Jur. 462, §448; 84 C.J.S. 224, §115). We now come to the question of when does tangible personal property acquire a tax situs separate from that of its owner.

It is stated in 2 Cooley on Taxation, 4th Ed., 982, §452 that "in order to acquire a situs in a state or taxing district regardless of the domicile of the owner and not taxable in another state or district at the domicile of the owner, tangible personal property must be more or less permanently located in the state or district. In other words, the situs of tangible personal property is where it is more or less permanently located rather than where it is merely in transit or temporarily for no considerable length of time." Cooley further states (p. 988) the "word 'permanently' is apt to be misleading unless read in connection with the facts of the particular case. It is impossible to lay down any general rule fixing the length of time or degree of permanency necessary to establish a taxable situs in the state." In 84 C.J.S. 226, §115, it is stated that the permanency necessary to establish a tax situs for tangible personal property is not "permanency in the sense that it must be fixed like real property, but seems generally to be that it must have a more or less permanent location as distinguished from a transient or temporary one." The power of the state, county or municipality where the owner of tangible personal property "is not abrogated in respect to property which may be temporarily absent from its territorial jurisdiction. In short, not until the property acquires an actual situs elsewhere does the domicile lose the right to tax." (Annotation in 110 A.L.R. 713-714). In *Simple v. Commonwealth*, 181 Ky. 675, 205 S.W. 789, the court remarked that "in order that personal property may have a situs for taxation in a locality different from the domicile of its owner, such personal property must be permanently located at the place where it is sought to be taxed."

Numerous authorities are collected in an annotation in 110 A.L.R., pp. 714-715, and 728-729, relative to the taxation of construction machinery, equipment, implements, etc., some permitting taxation at the place where physically present and others holding to the contrary; however, it is clear from the cases cited in the annotation that the question actually involved in each case was the question of temporary or permanent situs at the location where found when not that of the residence of the owner. In most of the cases cited, the element of time seemed to be material to the decision in the case. Other elements pointing to the use of the property and its permanency on the construction project have also

been considered. In *Arundel Corp. v. Sproul*, 136 Fla. 167, 186 So. 679, the corporation was the owner and user of a large seagoing dredge, used by it in connection with federal contracts for dredging in the intercoastal waterway, from the Georgia-Florida line and Miami, Florida, and in connection with dredging operations in the Everglades of Florida. This dredge was first brought into the state around January of 1933, and remained in the state until after Jan. 1, 1935, having been in Palm Beach county, on said Jan. 1, 1935. The domicile of the owner corporation was in another state. The said dredge was held to have acquired a permanent situs in Florida sufficient to make it taxable in Palm Beach county. In *Nat'l Dredging Co. v. Alabama*, 99 Ala. 462, 12 So. 720, cited with approval by the Florida court in *Arundel Corp. v. Sproul*, *supra*, a similar seagoing dredge was involved, which dredge had been in Alabama, from May 1, 1891, to around July 1892. Under these facts the court held that the dredge had acquired a tax situs in Alabama, notwithstanding the domicile of its owner. In *Bush v. Dade County*, 140 Fla. 277, 191 So. 515, a yacht owned by a resident of New York, had remained in Florida for a period of seven years; it was held that under the facts in that case the yacht had acquired a permanent situs for tax purposes in Florida.

In *Brock & Co. v. Los Angeles County*, Cal. 2d, 65 P. 2d, 791, 110 A.L.R. 700, a large jewelry store located in Los Angeles County, Calif., having a jewelry stock valued at about \$390,745 sent a portion of that stock of jewelry, valued at about \$143,465 to a location in Honolulu, Hawaii, for purpose of display and sale, should there be any demand to purchase. The jewelry sent to Honolulu was sent there for business purposes, but was returned to Los Angeles after a stay in Honolulu about 30 days. Its location in Honolulu was held to have been a temporary and not a permanent one. In *Joiner v. Pennington*, 143 Ga. 438, 85 S. E. 318, it was held that a portable sawmill will not acquire a taxable situs in a county where it is temporarily located even if it be there for a year.

When §200.09, F. S., provides that "Where a taxpayer has tangible personal property in more than one county, he shall make and file a separate tax return for each and every county," it refers to tangible personal property which has acquired a tax situs in the county, not merely a temporary or transitory location. To acquire a tax situs separate from its owner, tangible personal property must have permanency in that county, not permanency as applied to real property but permanency as distinguished from a transient or temporary location. Only those items of tangible personal property which have acquired permanency in the above sense may be taxed at a location other than that of the domicile of their owner. The question of the taxable situs of tangible personal property located in a county other than that of the domicile of the owner thereof, is whether or not it has acquired a status of permanency in that county within the rule above described. This seems to be largely a question of fact to be determined by the tax assessor in the first instance. The refusal of the owner of such property to return such property in the county where located would seem to be a construction on his part that such property had not acquired a separate tax situs.

The answer to the above stated question is that tangible personal property is taxable at the domicile of its owner unless it has acquired a separate tax situs under the rules above mentioned.

061-196—December 20, 1961

**REGULATION OF PROFESSIONS AND VOCATIONS
FLORIDA BEAUTY CULTURE LAW—PRACTICE UNDER A
FICTITIOUS TRADE NAME—§§477.15, 477.16, 477.23, 477.27,
477.28, 865.09, F. S.**

To: *Juanita W. Saunders, Executive Secretary, State Board of
Beauty Culture, Tallahassee*

QUESTION:

Under the provisions of §477.15(5), F. S., is it unlawful for any person, firm or corporation, holding a certificate of registration issued by the Florida state board of beauty culture, to advertise, practice, attempt to practice or teach beauty culture, under a fictitious trade name?

Section 477.15, F. S., provides, among other things, as follows:

The board may either refuse to issue, or renew or may suspend or revoke any certificate of registration for any of the following causes:

* * *

(5) Advertising, practicing or attempting to practice under a trade name "other than one's own." (Emphasis Supplied)

Section 865.09, F. S., is known as the fictitious name statute. "Fictitious name" is defined in subsection (2) of §865.09 as including "any trade name, whether a single name or a group of names, other than the proper name or known called names of those persons engaged in such business or professions." (Emphasis supplied.) See AGO 049-279, 049-359, 057-283 and 061-117.

The foregoing §477.15 (5), F. S., is substantially the same language used in the Florida Statutes relating to most other professions, trades, occupations and vocations, among which are the following:

Doctors of medicine, §458.15 (2) (c)
Doctors of osteopathy, §459.15 (6)
Chiropodist, §461.08 (1) (c) and §461.12(1) (c)
Naturopaths, §462.14 (3) and 462.17(1) (c)
Optometrists, §463.11
Dentists, §466.36
Funeral directors and embalmers, §470.10 (5)
Accountants, §473.17, 473.23 (4) and 473.26
Land surveyors, §472.14
Masseurs and masseuses, §480.11(1) (c)

Chapter 477, F. S., provides three remedies for the enforcement of §477.15 (5), supra, to-wit:

(1) Section 477.28, F. S., provides as follows:

The state board of beauty culture may institute legal proceedings to enjoin the violation of the provisions of this law upon the grounds set forth in subsections (1) and (2) of this section in any court of competent jurisdiction, and such court may grant a temporary or permanent injunction restraining the violation thereof, and closing any beauty shop failing to comply therewith, and no injunction bond shall be required of the state board of beauty culture in any such proceedings:

(1) Upon any person, firm or corporation violating

any of the provisions of §§477.02, 477.08, 477.15, 477.23 and 477.27. (Emphasis supplied.)

(2) Section 477.27, F. S., provides among other things as follows:

Each of the following shall constitute a misdemeanor and shall be punishable, upon conviction, by imprisonment in county jail for not more than six months or by fine not exceeding five hundred dollars, or by both fine and imprisonment, in the discretion of the court:

* * *

(8) A violation of any of the provisions of §§477.15 and 477.23.

(3) Pursuant to the provisions of §§477.15 and 477.16, F. S., the board, after a proper hearing, may refuse to issue, or renew, suspend or revoke "any" certificate of registration issued by it to any person, firm or corporation, including the owner of a school of beauty culture. *Beauty shops are not required by law to obtain a certificate of registration or license; however, they are required by a rule of the board to obtain a permit.* Sections 477.23(10) and 477.27(12) relative to rules of the board are also made grounds for disciplinary action. (See §477.15(8), (9), F. S.)

Pursuant to the provisions of Ch. 120, F. S., known as the uniform administrative procedure act, and by virtue of §477.23(10) and §477.27(12), F. S., the board may consider adopting carefully prepared appropriate rules to implement the first paragraph of §477.15, supra, which may allow a reasonable time for compliance with the law by those persons, firms, or corporations that have been advertising, operating, practicing or attempting to practice beauty culture, in the past, under a trade name in which their own name does not appear.

Subject to the foregoing observations, your question is answered in the affirmative.

061-197—December 20, 1961

COURTS

JUSTICE OF THE PEACE—FEES FOR MISDEMEANOR TRIALS OVER WHICH COURT HAS NO JURISDICTION
—§§37.01, 775.08, 81.26(2), F. S.

To: Bryan Willis, State Auditor, Tallahassee

QUESTIONS:

1. If a justice of the peace with criminal trial jurisdiction, as set forth by §37.01, F. S., tries a misdemeanor in which the punishment for such misdemeanor is by statute greater than the penalty provided in §37.01, F. S., is the justice entitled to his fees in the case?

2. If the answer to question 1 is in the negative, would the justice, under the same circumstances, be entitled to his fees if the defendant is adjudged guilty, and the sentence is not greater than the penalty set forth in §37.01, F. S.?

The jurisdiction of a justice of a peace is set out in §37.01, F. S., which states as follows:

Each justice of the peace in this state shall have:

* * *

(2) Jurisdiction, in counties having a population of

over fifty thousand according to the last preceding state census and no county court or criminal court of record, to try and determine all misdemeanors committed in their respective districts punishable by fine not exceeding five hundred dollars or by imprisonment not exceeding six months.

(3) Jurisdiction, in counties having a population of over fifty thousand according to the last preceding state census and a county court, to try and determine all misdemeanors committed in their respective districts punishable by fine not exceeding one hundred dollars or by imprisonment not exceeding three months.

(4) Jurisdiction, in counties having a population of not less than thirty thousand and not more than forty-five thousand according to the last preceding state census and a county court, to try and determine all misdemeanors committed in their respective districts punishable by fine not exceeding one hundred dollars or by imprisonment not exceeding three months.

What constitutes a misdemeanor in Florida is defined by §775.08, F. S., which states, "any crime punishable by death or imprisonment in the state prison is a felony, and no other crime shall be so considered. *Every other offense is a misdemeanor.*" The questions we are considering involve a misdemeanor in which the punishment prescribed therefor by a separate statute is, (a) a fine which exceeds the amount set forth in §37.01, F. S., or, (b) a term of imprisonment longer than those set forth in §37.01, F. S.

The rule is well recognized in most jurisdictions that a justice of the peace has no jurisdiction to try one accused of a crime, the maximum penalty, or punishment for which, exceeds the power of his court to impose. A similar rule obtains where the justice is given jurisdiction of certain types of offenses only where they are punishable by no other, or no greater, penalty than that stated, (22 C. J. S., Criminal Law, §125(3), pp. 340 and 341). Unless the court in which a prosecution is brought has jurisdiction of the offense charged against the defendant, any judgment and sentence of conviction entered on the charge made will be void (*Kennedy v. State*, 15 Fla. 635). See also *Porter v. State*, 62 Fla. 79, 56 So. 406, which relates particularly to courts of justices of the peace. Therefore, in the instant situation, the justice of the peace who purported to try a misdemeanor, the penalty for which was in excess of the jurisdiction of his court (as provided in §37.01, F. S.), was acting without authority, the procedure was void, and his actions were a nullity.

The foregoing comments are also applicable to the situation raised in question 2. The fact that the justice of the peace imposed a sentence within the limits of his jurisdiction would be immaterial if the punishment provided for such misdemeanors under some other penal law was, in fact, greater than set forth in §37.01, F. S. Said section clearly states that the jurisdiction of a justice of the peace covers *only* those misdemeanors "punishable by fine not exceeding" a certain amount, or "by imprisonment not exceeding" a certain length of time.

The questions now resolve themselves as to whether a justice of the peace is entitled to fees for the actions taken in cases where his court lacked jurisdiction. There are no cases in Florida on point. However, compensation to public officers has been defined as

remuneration for doing all that may be required of the official, i. e., for all official acts, (26 Fla. Juris., Public Officers, §139, p. 275). The right of a public officer to compensation is not inherent. If officers are to receive such compensation, provision therefor must be found in the constitution or statutes of a state (43 Amer. Juris., Public Officers, §§340, 341, pp. 134 and 135). The fees of a justice of the peace are set out in §81.26(2), F. S.; "The fees of a justice of the peace shall be the same as those of the clerk of the circuit court for similar services." We must read into the words, "similar services," the term, "official." It would be an absurdity if a public officer could collect fees and compensation for acts which he was unauthorized to perform. A comparison for illustrative purposes can be drawn by assuming the justice of the peace holds a trial in which the defendant is charged with a capital crime. Such a case is beyond his jurisdiction, and the justice of the peace could not collect any compensation therefor. There can be no distinction drawn between this illustration and that of our instant case. There are no degrees of jurisdiction. The trying of a misdemeanor, the punishment for which is greater than that allowed by §37.01, F. S., is as much beyond the jurisdiction of the court as would be the trying of a felony charge. If this conclusion is not correct, it would lead to the unintended result that any court, and any justice thereof, could preside and adjudicate any case, no matter what its nature, the amounts involved, its penalty, no matter to what extent their jurisdiction was exceeded, and still be entitled to all fees in connection with such cases.

In view of the foregoing reasoning and citations, I must conclude that justices of the peace are not entitled to fees in those misdemeanor cases, as set forth in questions 1 and 2, since the court lacks jurisdiction.

Questions 1 and 2 are, therefore, answered in the negative.

061-198—December 20, 1961

**AUTO TRANSPORTATION COMPANIES
CONSTRUCTION OF EXEMPTION PROVISIONS IN CH. 323,
F. S.—APPLICATION—§167.431, F. S.**

To: John V. Russell, City Attorney, Fort Lauderdale

QUESTIONS:

1. Does §323.15, F. S., exempt auto transportation companies, registered under Ch. 323, F. S., from municipal taxes imposed under and pursuant to §167.431, F. S.?

2. Where a person, firm or corporation, engaged in the business of operating an auto transportation company under Ch. 323, F. S., engages at the same time in some business not within the purview of §323.15, F. S., does said §323.15, grant him a like exemption as to the other business carried on?

3. Is the exemption from taxation for auto transportation companies, contained in said §323.15, applicable to such transportation companies notwithstanding subsequent legislation relating to municipal taxation?

Said §323.15, in so far as here material, provides that "the mileage tax provided for in this section shall be in lieu of all other taxes and fees of every kind, character and description, state, county or municipal, including excise and license taxes levied or im-

posed against such auto transportation companies, or the operation of such business and facilities thereof, or their property other than motor vehicles and except the gasoline tax and motor fuel tax, and except the motor vehicle license tax now or hereafter provided by law." This §323.15, originated as §16, Ch. 14764, 1931, which was amended by §3, Ch. 18026, 1937, and was brought into the Florida Statutes, 1941, as §323.15 thereof, containing no provision for exemption from taxation, as is provided by the above quoted portion of said present §323.15.

Section 1, Ch. 22834, 1945, amended said §323.15, which amendment contained the provision that "the mileage tax provided for by this section shall be in lieu of all other taxes and fees of every kind, character and description, state, county or municipal, except ad valorem taxes levied upon the property other than motor vehicles of such auto transportation companies and except the gasoline tax, and except the motor vehicle license tax now or hereafter provided for by law." Section 1, Ch. 26663, 1951, amended the above quoted provision in Ch. 22834, by inserting, between the words "municipal" and "except," the following, to wit: "including excise and license taxes levied or imposed against such auto transportation companies, or the operation of such business and facilities thereof, or their property." This act appears to have become effective around May 21, 1951. Chapter 61-272 made no change in this provision; in fact, the amendment made by the 1961 act was to relieve the state comptroller of any duty previously imposed upon him in the administration of the section.

In *Tamiami Trail Tours v. Tampa*, 159 Fla. 287, 31 So. 2d 468, text 471, upon a question substantially the same as that posed by question 1, the court stated that "our conclusion is that it was the legislative intent to make the tax contemplated by Ch. 22829 (§167.431, F. S.) a tax not affected by the exemption provided for in said §323.15, although the exemptions named therein were reenacted in Ch. 22834," 1945. The effect of the language used in §2, Ch. 22829 (repealing all conflicting laws, etc.) was to make the provisions of said chapter supersede and take precedence over any legislative act then existing or then in the course of passage which created, or attempted to create exemptions from the tax authorized by said §167.431, F. S. The amendment by Ch. 61-272 of §323.15, indicates no intention on the part of the legislature to change this rule announced by the court aforesaid, nor does the title to said act. This case leads to a negative answer to question 1.

The court in *Tamiami Trail Tours, Inc. v. Orlando*, Fla., 120 So. 2d 170, held that the above quoted exemption provisions of said §323.15, prohibited the city of Orlando from requiring that auto transportation companies obtain a permit from the city before using loading and unloading zones established by the municipality, for which permits an initial fee of \$10 was charged, together with an annual renewal fee of \$1. These charges were considered by the supreme court as being in effect an excise tax. There is no indication that the authority of the municipality was derived from an act subsequent to the laws from which said §323.15, was derived.

Exemptions from license, sales, privilege or occupational, use or other excise taxes will not be implied or presumed, but must be clearly expressed by constitutional, statutory or ordinance provisions, which are to be strictly construed against the claimed exemption (53 C.J.S. 603, et seq., §31; *Harper v. England*, 124 Fla. 296, 168 So. 403, text 406). The exemption under said §323.15, clearly applies to those persons, firms and corporations duly and regularly

qualified under Ch. 323, F. S., to carry on an auto transportation business within this state. An auto transportation business appears, from a study of the several definitions contained in §323.-01, F. S., to be those persons, firms and corporations using motor vehicles "in the business of transporting persons or property for compensation over any public highway in this state," as may be more specifically defined in the subsections of said section. The term "highway" as used in the above quotation means "every public street, road or highway in this state," which includes municipal streets. Transportation of goods, wares, merchandise and persons doubtless includes necessary storage for such goods, wares, merchandise and persons while in interstate or intrastate movement, such as in depots. This does not seem to include warehouses and warehousing as contemplated by Ch. 678, F. S., relating to warehousemen and warehouse receipts. Warehousing within the purview of Ch. 678, supra, and an auto transportation business as contemplated by Ch. 323, supra, are separate and distinct businesses. The exemption in §323.15, supra, in connection with the carrying on of an auto transportation business, has no application to warehouse businesses, although carried on by the same person, firm or corporation. This leads to a negative answer to question 2.

It is clearly demonstrated by the court in *Tamiami Trail Tours v. Tampa*, supra, that statutes and laws enacted subsequent to the exemption provision in said §323.15, that provide for the imposition of license taxes and excise taxes, which may be deemed in conflict with the said statutory provision of tax exemption, supersede and repeal the said exemption provisions to the extent of the conflict, unless they by specific provision or by implication show an intention to recognize said exemption. In the last above mentioned case, §167.431 was held to be such a statute. This raises the question of the priority of provisions in municipal charters enacted subsequent to 1945, when the tax exemption provision became effective, making specific provision for the imposition of licenses and excise taxes, which may, like §167.431, conflict with said §323.15. This is a matter upon which no general rule may be advanced for determining priority of charter provisions over §323.15, when the charter provision was adopted subsequent to the advent of the exemption provision into said §323.15, which was around 1945. No general answer may be given to question 3 above; the question is one that must be determined in each particular case applying applicable rules of statutory construction. Said §167.431 authorizes the imposition of a municipal excise tax on certain utility services.

061-199—December 21, 1961

COUNTY OFFICERS

CONTRACTS IN CONNECTION WITH COUNTY BUSINESS— CONFLICT OF INTEREST—§839.07, F. S.

To: *Bryan Willis, State Auditor, Tallahassee*

QUESTION:

May a board of county commissioners rent office space or other real property from one of its members on the following basis: (a) month to month? (b) lease for a year or less? (c) lease for more than a year?

Section 839.07, F. S., condemns in general terms a conflict of

interests which exists in those situations where an officer of the county is in any way interested in a contract for a performance of any public work.

In *State v. Hooten*, 122 So. 2d 336, the supreme court of Florida determined an indictment charging a misdemeanor under said section to be valid where a county officer was interested in the sale of property owned by said officer to the county. Based upon the provisions of said statute and the cases of *Town of Boca Raton v. Raulerson*, 108 Fla. 376, 146 So. 576, 577 and *City of Stuart v. Green*, 156 Fla. 551, 23 So. 2d 831, the court in effect declared transactions between the county and a member of the board of county commissioners of the county involving county funds in the county's purchase of realty owned by said commissioner to be contrary to the public policy of this state. In the *Hooten* case the court stated that the basic underlying purpose of §839.07, F. S., prohibiting any officer from being in any way interested in contracts for the performance of any public work in which said officer is a party to the letting, is to preclude public officers from misuse of the power of their office for their profit. The prevention of influenced decisions effectuates the advancement and protection of the public good.

I am of the opinion that contracts between a member of the board of county commissioners and the county of which he is an officer whereby said commissioner leases property which he owns to the county, are contrary to the declared public policy of the state as set forth by §839.07, F. S., and are void.

Your question is answered in the negative.

061-200—December 27, 1961

TAXATION

EXEMPTIONS FROM AD VALOREM TAXES—EDUCATIONAL INSTITUTIONS—§192.06, F. S.; §1, ART. IX AND §16, ART. XVI, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Is a dwelling house, owned by a private educational institution doing business in this state, when located on or off the campus of such institution and occupied by the president or other officer or employee of such institution, entitled to tax exemption?

For the purpose of this opinion we shall presume, but not officially determine, that the institution in question is an educational institution within the purview of §192.06, F. S., and §1, Art. IX, and §16, Art. XVI, State Const., relating to tax exemptions. The fact that the institution in question is an educational institution is not decisive of the question of tax exemption under the said statute and constitutional provisions. State constitutional provisions, such as §1, Art. IX, and §16, Art. XVI, State Const., "are in no manner grants of power, as is the federal constitution, but are limitations upon the power of the state legislature" (*Sun Ins. Office, Limited v. Clay*, Fla., 133 So. 735, text 741). This rule seems to have been followed in *State v. Doss*, 146 Fla. 752, 2 So. 2d 303, text 304; *State v. St. John*, 143 Fla. 544, 197 So. 131, text 134 and *L. Maxcy, Inc., v. Fed. Land Bank*, 111 Fla. 116, 150 So. 248, text

250, as to tax exemptions mentioned in said constitutional provisions.

An examination of said §192.06, F. S., and said constitutional provisions, reveals that they require, for a taxpayer to be entitled to the exemptions therein mentioned, as to his or its property, that such property must not only be held for one or more of such purposes but must also be used for one or more of such purposes, before it may be entitled to tax exemption. This thought seems evident in the following portion of §16, Art. XVI, State Constitution, to wit, "The property of all corporations . . . shall be subject to taxation unless such property *be held and used exclusively* for religious, scientific, municipal, educational, literary or charitable purposes." Unless the dwelling house mentioned in the above question is being "held and used exclusively for . . . educational . . . purposes," or some other of the above mentioned purposes, it may not be granted tax exemption. If the dwelling in question is being held and used exclusively for one or more of the purposes mentioned above, it is entitled to tax exemption whether located on the campus of the institution or elsewhere within the county.

We come to the question of whether the occupancy of the dwelling in question by the president, chancellor, or other personnel of the educational institution and his family (a husband and wife will constitute a family), engaged in the operation of the institution is a use exclusively for an educational purpose, or other purpose above mentioned. In *Rast v. Hulvey*, 77 Fla. 74, 80 So. 750, one George W. Hulvey owned a parcel of land in Duval county, upon which he maintained and operated the Florida military academy, an educational institution within the purview of the above constitutional provisions. There were several buildings located on this parcel of land which were used for educational purposes, one of which was occupied by the said Hulvey and his family. The school was operated by Hulvey and several teachers, including his wife. The court held that the building occupied by the Hulveys was not held and used exclusively for educational purposes, but was "also being used by such individual as his home for living quarters and for uses directly connected with the family," and was, therefore, subject to taxation. So far as we are advised, this opinion has not been overruled, having been cited in a concurring opinion in *Gwin v. Tallahassee*, Fla., 132 So. 2d 273, text 285 and 286. Generally upon the question involved see annotation in 15 A. L. R. 2d 1064, et seq.

Although *Rast v. Hulvey*, supra, did not involve a corporation, and was, therefore, under §192.06, F. S., and §1, Art. IX, State Const., and not under §16, Art. XVI, State Const., relating to corporations, it seems to adopt a rule as to what constitutes an educational use and what does not constitute an educational use, which definition we must apply to said §16, Art. XVI, until it be otherwise determined by the courts.

The above question is, therefore, answered in the negative.

061-201—December 27, 1961

TAXATION

TAXATION OF INTANGIBLE PERSONAL PROPERTY—U. S. REFUGEES FROM CUBA—§199.07, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where citizens of the U. S. residing in Cuba were, by reasons of political unrest, forced to flee therefrom and become refugees located in Florida, is their intangible personal property subject to taxation in Florida?

Owners of intangible personal property "which is subject to taxation under the laws of Florida" are required to "file a sworn return of the same with the county assessor of taxes in the proper county" within the time required by law (§199.07, F. S.). This statutory provision poses the question of when are intangibles subject to taxation in Florida. As to intangibles, the general rule of extensive application is that their situs for taxation is the domicile of their owner (51 Am. Jur. 475 and 476, §463; 84 C. J. S. 656 and 657, §320; 30 Fla. Jur. 556 and 557, §127). Intangible personal property is taxable at the domicile of its owner, unless it has acquired a business situs elsewhere. There appears to be nothing here involved that tends to show the establishment of a business situs for the property in question.

This brings us to the question of the domicile of the person mentioned in the above question and whether or not the same is in this state. In *Minick v. Minick*, 111 Fla. 469, 149 So. 483, text 488, and *Housey v. Rutter*, 123 Fla. 156, 166 So. 558, text 559, the court distinguished between "residence" and "domicile," holding that "residence" indicates a place of abode, whereas "domicile" denotes a fixed permanent residence to which when absent one intends to return. In *Warren v. Warren*, 73 Fla. 764, 75 So. 35, the court cited with approval from Ruling Case Law that "any place of abode or dwelling place constitutes a 'residence', however temporary it may be, while the term 'domicile' relates rather to the legal residence of a person, or his home in contemplation of law. As a result, one may be a resident of one jurisdiction although having a domicile in another." In 17A Am. Jur. 198, §4, the statement is made that "no general principle in the law of domicile is more firmly established than the basic rule that every person has at all times one domicile, and that no person has more than one domicile at a time, no matter how many residences he may have."

When determining domicile, certain presumptions are indulged in: (1) That domicile by origin or choice is presumed to continue until it is shown to have changed, (2) the one alleging a change of domicile has the burden of supporting and proving such change, (3) actual residence in a place raises a presumption of domicile, and (4) there is a presumption that the domicile of a married man is the place where his family resides (17A Am. Jur. 258 to 260, §§87, 88 and 89). However, these presumptions are overcome when prima facie evidence is produced showing the facts to be otherwise. The person who contends that the domicile of an identified person is at a specified location has the burden of proving that domicile, subject, however, to any existing prima facie presumptions (17A Am. Jur. 261 and 262, §91).

There are indications in the letter handed us with your request

for opinion that the owner in question was born of American parents, in Cuba, and that he has made his residence in Cuba for many years, and, except for the present political condition in Cuba, would have remained there; that he expressed an intention to return to Cuba as soon as political conditions will permit; and that he considers himself at most a mere temporary resident of Florida and not a citizen thereof. Although the said letter indicates that the person in question considers himself to be a citizen of the U.S., there is evidence therein that he does not deem Florida his domicile. Under the evidence presently before us, it would be difficult to support a contention that the person in question is in fact domiciled in Florida, or that he is more than a temporary resident of the state.

Unless it is shown that a person residing at a given location considers it his true, fixed and permanent home and principal establishment, and to which place he has, whenever absent therefrom, the intention of returning and from which he has no present intention of moving (see 17A Am. Jur. 194 and 195, §2), no domicile would seem to have been established at that location. These requirements may be proved by competent evidence, and by sufficient evidence, the domicile of a person may be established even over the objection of the person in question.

The above stated question may be answered in the affirmative only where it is evident, under the above and foregoing rules, that the person in question has his domicile in Florida and is not a mere temporary resident of the state.

The question is one to be determined in the first place by the tax assessor from all the facts and circumstances involved under the foregoing rules.

061-202—December 27, 1961

TAXATION

EXEMPTIONS—CONSTRUCTION OF §192.06(3), (4), F. S.—
CHS. 651 AND 400, F. S.; §1, ART. IX AND §16, ART. XVI,
STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTIONS:

1. Are recreation rooms, dining halls, chapels and infirmaries, for use by occupants of a building housing persons under care contracts within the purview of §192.06(3), F. S.?

2. Are payments made pursuant to care contracts, either for life or a term of years, as defined in Ch. 651, F. S., rents within said §192.06(3)?

3. Are nursing homes as defined in Ch. 400, F. S., hospitals as used in said §192.06(3)?

4. Where a building housing persons under life care contracts contains a chapel where religious services are conducted under the direction of a full time minister, is such building, or any part thereof, a house of worship within the purview of §192.06(4), F. S.?

These questions seem to, in fact, raise the question of the application of our opinion of Oct. 27, 1961 (AGO 061-175) to the facts as above set out. In considering the above stated questions it becomes necessary that we consider the application of §192.06,

F. S., generally, and with special reference to subsections (3) and (4) thereof. Section 1, Art. IX, and §16, Art. XVI, State Const., are limitations upon the legislature and its power and authority to provide for tax exemptions, not otherwise provided by the state constitution itself (State v. Doss, 146 Fla. 752, 2 So. 2d 303, text 304; State v. St. John, 143 Fla. 544, 197 So. 131, text 134; and L. Maxcy, Inc. v. Fed. Land Bank, 111 Fla. 116, 150 So. 248, text 250). This rule, in its general application, was approved in Sun Ins. Office, Limited v. Clay, Fla., 133 So. 2d 735, text 741. This being true, said §192.06, including said subsections (3) and (4), must be construed in the light of the limitations imposed upon the legislature by said constitutional provisions.

The limitation imposed by the said constitutional provisions upon the legislature is that ad valorem tax exemptions granted by the legislature may be extended only to property "held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes." Unless the recreation rooms, dining halls, chapels and infirmaries mentioned in question 1, the nursing homes mentioned in question 3, and the chapel mentioned in question 4, are held and used exclusively for one or more of the purposes above mentioned, they are not within the purview of said §192.06, F. S. Likewise it makes no difference whether life care payments constitute rents or not unless such rents are used exclusively for one or more of said purposes. The rules for determining tax exemption under §192.06, F. S., and under §1, Art. IX, and §16, Art. XVI, State Const., were discussed in our opinion of Oct. 27, 1961 (AGO 061-175); these rules are applicable to the above stated questions in determining the answers to said questions. Although property may be used to a minor extent for some purpose within the purview of §1, Art. IX, and §16, Art. XVI, State Const., its major use is the determining factor (Johnson v. Sparkman, 159 Fla. 276, 31 So. 2d 863, text 865). Whether the recreation rooms, dining halls, chapels, nursing homes, and other facilities mentioned in said questions are entitled to tax exemption depends upon whether or not they are held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes. If not so used, such facilities are not entitled to tax exemption. Likewise whether chapels, infirmaries, nursing homes, hospitals and similar institutions are entitled to tax exemption is determined in the same manner. Tax exemption as to each parcel of land claimed to be tax exempt depends upon whether such parcel of land is used and held exclusively for one or more of the purposes aforesaid.

The furnishing of recreation rooms, dining halls, chapels, infirmaries, and the like to occupants of an apartment or other building housing persons and families, does not of itself entitle such facilities to tax exemption. Only when such facilities are held and used exclusively for one or more of the above mentioned purposes will they be entitled to tax exemption. Whether nursing homes be deemed hospitals or not seems immaterial when determining their right to tax exemption, as in either case the right to tax exemption depends upon whether they are held and used exclusively for one or more of the above mentioned purposes.

Specific mention is made concerning the chapels mentioned in questions 1 and 4, which are tax exempt only when held and used exclusively for one or more of the purposes above mentioned, when their use is such as to make their use a religious purpose and a house of public worship. In those cases where such chapels are

houses of worship, within the purview of §192.06(4), F. S., the chapel itself, and not the building in which located, would be entitled to the tax exemption (*Simpson v. Bohon*, 159 Fla. 280, 31 So. 2d 406; *State v. Doss*, 150 Fla. 491, 8 So. 2d 17, text 18).

The above stated questions are answered as follows:

1. Only when recreation rooms, dining halls, chapels and infirmaries, for use by occupants of a building housing persons under care contracts, are held and used exclusively for some religious, scientific, municipal, educational, literary or charitable use, are they entitled to tax exemption.

2. Payments made pursuant to care contracts, either for life or a term of years, as defined in Ch. 651, F. S., whether deemed rents or not under §192.06(3), are within the purview of said subsection and section only when used for one or more of the above mentioned purposes stated in the Florida constitution.

3. The tax exemption status of nursing homes, whether deemed hospitals or not as defined in Ch. 400, F. S., is dependent upon whether or not their property is held and used exclusively for one or more of the above mentioned purposes stated in the Florida constitution.

4. Where a building housing care contract persons has and maintains a chapel, deemed a house of worship, and used primarily for religious purposes, the said chapel, and not the building wherein located, would be entitled to tax exemption.

061-203—December 28, 1961

TAXATION

TANGIBLE PERSONAL PROPERTY TAX WARRANTS—EXECUTION IN COUNTY OTHER THAN WHERE ASSESSED—
§§200.02, 200.25, 200.27, 200.30, 193.41, 193.46-193.50, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

When and under what conditions may a tangible personal property tax warrant, issued in one county, be executed upon property of the taxpayer in another county?

This question seems to require the construction of §§200.27 and 200.30, F. S., each relating to the enforcement of tangible personal property taxes. For the purpose of this opinion, we presume that the tax assessment against the property assessed was valid and supported the assessment as made. We do not here pass upon the validity of the assessment but accept it, for the purposes of this opinion, as being valid and enforceable. Above §200.27 seems to relate to the enforcement of the assessment in the county where the assessment was made, and §200.30 seems to relate to the enforcement of the assessment in another county, the county to which assessed property has been removed subsequent to the assessment.

Preliminary to further consideration, it is noted that §200.02, F. S., makes an assessment of tangible personal property "a lien on all the personal property of the taxpayer in the county in which they are assessed from the first day of January of the tax year," and under §200.25, such taxes become due and payable on November 1 of each year, or as soon thereafter as the tangible personal property tax roll comes into the hands of the tax collector. Under §200.27, F. S., tangible personal property taxes, not previously paid,

become delinquent on April 1 of the tax year, and subject to enforcement in the manner provided by the statutes. Said §200.27 provides a procedure whereby tax warrants are issued by the tax collector to be enforced by him and his deputies, evidently within the county where the assessment was made. This procedure seems to be under and pursuant to the tax lien provided by said §200.02, which lien is confined to the county where the property is assessed. Section 200.30 provides another collection procedure where the property taxed is removed from the county to another county.

In an opinion of this office, by a former attorney general, of April 15, 1941, discussing §193.41, F. S., the same being substantially as above mentioned §200.30, stated that "you will note that this statute is only applicable where personal property has been removed from the county in which said property was assessed." Also, in an opinion of July 2, 1948, the said attorney general further said that "there is doubt as to whether a warrant might, under the statute, be issued to the sheriff of another county to which the property in question was not removed." A study of the history of §§200.27, to 200.30, inclusive, as well as of §§193.46 to 193.50, inclusive of said statutes, which are in substance the same as the mentioned sections in Ch. 200, as well as previous laws upon the same subject, indicate that §200.27 is applicable when collection of the tax is to be enforced in the county where the tax was assessed, and that §200.30 is applicable when the property taxed has been removed from the county to another. In the instant case we feel that the warrant should have been issued under §200.30 and not under §200.27.

Where tangible personal property assessed in one county is removed from that county subsequent to said assessment, the fact of removal makes §200.30 the applicable statute, and not §200.27. Section 200.30 provides that when tangible personal property is removed from the county wherein it was assessed "it shall be lawful for the tax collector of the county, by his warrant to authorize the sheriff of the county within this state to which such tangible personal property *shall have been removed* to collect such taxes and the sheriff may proceed thereon as upon execution from the circuit court." The warrant so issued should recite the removal of the taxed property from the county to another county, naming it, to show the authority of the tax collector to issue it under and pursuant to said §200.30. When so issued, it may be levied on any property of the taxpayer within the county named, as if it had been an execution issued on a judgment of the circuit court. These observations answer the above stated question. The warrant in question does not seem to conform to these requirements; it should be replaced by a proper warrant.

See also opinion of July 2, 1948 (AGO 048-221, 1947-1948 AGO 244).

062-1—January 9, 1962

INSTITUTIONS OF HIGHER LEARNING

DEAD BODIES — UNIVERSITY OF FLORIDA MEDICAL
COLLEGE — DISPOSITION — §245.14 F.S.

To: W. G. Hendricks, Business Manager, Board of Control, Tallahassee

QUESTION:

May the university of Florida college of medicine

transfer surplus dead bodies to other out-of-state medical schools at no expense to the university when the university has run out of storage space?

Section 245.14, F. S., provides:

Bonds; institutions receiving bodies.—No university, school, college, teaching hospital or association shall be allowed or permitted to receive any such body or bodies as described in this chapter until a bond, approved as to form by the attorney general shall have been given to the board which bond shall be in the penal sum of one thousand dollars conditioned that all such bodies received by such university, school, college, teaching hospital or association shall be used for no other purpose than the promotion of medical science within this state. (Emphasis supplied.)

Since the Florida law above quoted requires the university of Florida to furnish a bond to the state anatomical board conditioned upon use of the dead bodies it receives "for no other purpose than the promotion of medical science within this state," your question is answered in the negative.

062-2—January 11, 1962

STATUTES

CONSTRUCTION OF §27.22, F. S., BASED ON POPULATION OF JUDICIAL CIRCUIT RELATING TO APPOINTMENT OF ADDITIONAL ASSISTANT STATE ATTORNEYS—§§27.21, 114.04 F. S.; §5, ART. VII, STATE CONST.

To: Farris Bryant, Governor of Florida, Tallahassee

QUESTION:

Where a judicial circuit, by reason of an increase in population, passes from the purview of §27.21, F. S., into the purview of §27.22, F.S., is a vacancy in the office of an assistant state attorney created to be filled by the governor?

Said §27.21 regulates the number of assistant state attorneys in judicial circuits of the state having a population of 192,000 or less, according to the last preceding state census, as well as their selection and terms of office, while §27.22 regulates the number of such assistant state attorneys in judicial circuits with a population of more than 192,000 which includes a county with a population of more than 180,000, each according to the last preceding state census. Section 5, Art. VII, State Const., adopts each federal decennial census as a state census, declaring that such federal census "... shall control in all population acts and constitutional apportionment . . ."

According to the 1960 decennial federal census the counties comprising the 10th judicial circuit of Florida which includes Polk, Highlands and Hardee counties, with respective populations according to said census of 195,139, 21,338 and 12,370, make a total for the said circuit of 228,847. The population of said judicial circuit being 228,847, with a county of a population of 195,139, brings the said circuit within the purview of said §27.22, F. S. Prior to the said 1960 census, the population of the said circuit, according to the 1950 census, was 147,706, bringing it within the purview of §27.21, F. S. By reason of the 1960 census, the 10th judicial circuit of the state passed from the purview of said §27.21 to the purview of said §27.22.

Under said §27.21, the assistant state attorney was appointed by the governor, with the consent of the state senate, for a term of four years, the said statute making no mention of a date of beginning or a date of termination. Terms of office for the original appointees under this section were for four years from and after July 31, 1935. The state senate, at its 1959 regular session, consented to the appointment of Joseph O. Macbeth for a four-year term, beginning July 31, 1959. Under §27.22, the terms of office of assistant state attorney of judicial circuits within the purview of said §27.22, expire with the term of the state attorney for the circuit. Current terms of state attorneys began on Jan. 3, 1961 and will expire on the first Tuesday after the first Monday in January, 1965.

In the light of the court's opinion in *Gray v. Bryant*, Fla., 125 So. 2d 846, text 850 and 851, and the authorities therein cited and referred to, no further legislation is necessary to transfer a judicial circuit, upon its population being increased from within the purview of §27.21, to within the purview of §27.22. The 10th judicial circuit is no longer within the purview of §27.21, F. S., but within the purview of §27.22. There is now, and has been since the effective date of the 1960 federal census, if not previously filled, a vacancy in the office of an additional assistant state attorney for the 10th judicial circuit. The current term of office for such assistant state attorney will expire with that of the state attorney in 1965. However, under §114.04, F. S., the said vacancy in office should be filled until the end of the next ensuing session of the state senate, in accordance with said section, at which time it will be filled for the period of time ending on the first Tuesday after the first Monday in January, 1963, by the governor with the consent of the state senate.

In the light of the above and foregoing laws and authorities, the above question is answered in the affirmative.

062-3—January 11, 1962

BANKS AND BANKING

LOANS BY BANKS TO THEIR OFFICERS AND DIRECTORS— REQUIREMENTS—§659.17(1),(2), F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTIONS:

1. Does §659.17(1), F. S., require that every loan by a bank to one of its officers or directors be approved by its board of directors?

2. If question 1 is answered in the affirmative, will the approval of a line of credit constitute an approval of a loan within the purview of said subsection and section?

3. Likewise, is a renewal of an existing loan within the purview of said subsection and section?

4. Likewise, is an extension of the time for payment of such a loan within the purview of said subsection and section?

The subsection in question provides that "no bank shall lend directly or indirectly an amount exceeding ten per cent of the aggregate unimpaired capital and surplus of said bank to any director or officer of said bank, individually or to any co-partnership or incorporated company in which a director or

officer may be directly or indirectly interested. No such loans shall be made unless the same *shall be first approved by the board of directors of such bank.*" (Emphasis supplied.) This subsection appears to have been derived in substance from Ch. 7269, 1917, which was brought into the Revised General Statutes, 1920, as §4151, which section, as amended by Ch. 20939, 1941, was brought into the Florida Statutes, as §653.18, which was brought into the 1953 revision and recodification, by Ch. 28016, 1953, as §659.17, F. S.

In the absence of a statute such as §659.17, F. S., a loan by a bank to one of its officers or directors would not be prohibited under the common law (9 C.J.S. 801, §386); however, there must be a compliance with any statutory restrictions or requirements placed on loans to bank officers or directors (9 C.J.S. 801 and 802, §386). Most statutes of this nature place limitations upon loans to a bank's officers and directors, and sometimes employees, such as the approval by a prescribed number or proportion of the directors (7 Am. Jur. 263, §366).

"Banks are indispensable agencies through which industry, trade and commerce are carried on, and even though they exist mainly for private profit they are pre-eminently of a public nature and subject to statutory regulation for the protection of the public. A bank's relation to the community is so intimate and its services are of such far-reaching and comprehensive scope that it is almost classed as a public utility." (4 Fla. Jur. 94, §4; 7 Am. Jur. 30 and 31, §9; 9 C.J.S. 32 and 33, §5). The business of banking "is subject to public regulation, because affected with a public interest." (Bryan v. Bullock, 84 Fla. 170, 93 So. 182, text 186). Statutes and laws, like and similar to §659.17, F. S., placing limitations upon the powers and authority of banking institutions, are designed as such regulations for the protection of the public. Section 659.17, F. S., which places certain limitations upon banks of this state when making loans, including the requirement that all loans to its officers and directors "shall first be approved by the board of directors of such bank," was designed by the legislature as a protection to the depositors, creditors and stockholders of the banks of the state. Doubtless it was the legislative intent of §659.17(1), F. S., to require that every loan by a bank to one of its officers or directors be approved by its board of directors.

Question 1 having been answered in the affirmative, we come next to the question of whether an approval of a line of credit to an officer or director of a bank, by its board of directors, meets the requirements of said §659.17(1), that bank loans by a bank to its officers and directors may not be made "unless the same shall first be approved by the board of directors of such bank." In other words, is a *line of credit*, granted by the board of directors of a bank to one of its officers or directors, in law a *loan* within the purview of said §659.17(1)? "A loan by a bank ordinarily imports a borrowing of money, or its equivalent, by one who promises to return the same with interest, or, what is the same thing in effect, by one who pledges collateral as security and promises to redeem it." (7 Am. Jur. 468, §646). "A loan by a bank, like any other loan, is the furnishing or delivery of anything, usually money in the case of a bank, on the condition or agreement, express or implied, that the thing loaned or its equivalent in kind shall be returned or repaid. From this definition it is apparent that

it is ordinarily essential to the existence of a loan that there be both an actual delivery of something to another, and a promise of repayment. If the elements are not present, the transaction is not a loan, no matter how it may be labeled or what it may be called by the parties." (9 C.J.S. 797, §383). This definition of a loan appears to have been recognized by the court in *First American Bank and Trust Co. v. Palm Beach*, 96 Fla. 247, 117 So. 900, text 903 and 904). See also the definition of the word "loan" in 25A Words and Phrases, 78, et seq.

We come next to the meaning of the term "line of credit," when used in connection with business and banking. The term seems to signify the granting to another, by a bank or other business institution, a margin of credit to be used in obtaining merchandise or money without having to establish one's credit rating before each money or credit transaction. The term seems to imply a general agreement or contract between a business firm or bank *to enter into loan or purchase contracts*; it is not the ultimate loan or purchase agreement itself. The term seems to imply future transactions, consisting of purchases of merchandise or the borrowing of money without the furnishing of other or further credit rating. (See 25 Words and Phrases 527-528; 21 C.J.S. 1044 and 1045, notes 12, 13 and 14; Black's Law Dict., 4th Ed., 1078). In *Pittinger v. Southwestern Paper Co.*, Tex. Civ. App., 151 S.W. 2d 922, text 925, the court stated that where a line of credit is established by a business firm for a customer, that such line of credit is usually intended "*to cover a series of transactions between the business firm and the customer.*" (Emphasis supplied.) These authorities seem to treat the establishment of a line of credit by and between a business establishment and a customer as being more in the nature of an agreement for further transactions between the parties rather than a completed transaction. As between a bank and its customers, it is preliminary to the actual making of a loan.

Further in this connection, the statutory requirement that loans by a bank to its officers and directors have the approval of the board of directors of the bank was designed for the protection of the depositors, stockholders and creditors of the bank, and to preserve its assets and deposits against illegal use or loan. When loans are made by a bank to its officers, it is necessary that the bank have the official approval of the board of directors as to each and every loan. The statutes prohibit the adopting of a general rule as to such loans to be administered by the officers and employees of the bank, other than its directors in session. This being the purpose of the legislation in question, it should receive a strict construction in favor of the bank's depositors and stockholders and against the officers of the bank. It should be so construed as to protect the rights and interests of the depositors and stockholders against the wrongful actions of the bank's officers and directors. We, therefore, feel that question 2 should be answered in the negative, as the approval of a line of credit is not within itself a loan within the purview of §659.17(1), F. S. When a line of credit is granted by a board of bank directors to one of their number or one of the bank's officers, the actual loan made pursuant thereto must also have the express board's approval,—general approval is not sufficient. However, we also believe the granting of a "line of credit" to one of the bank's officers or directors must also have

the express approval of the board inasmuch as such "line of credit" might operate to obligate the bank either directly or contingently.

We come next to the question of whether or not a renewal of an existing loan, from a bank to one of its officers or directors, is a loan within the purview of said §659.17(1). The court, in *Lee v. Quincy State Bank*, 127 Fla. 765, 173 So. 909, text 910, held that "a renewal of a note involves a new contract by the maker or obligor." See also *Reese v. Schenck*, 107 Fla. 166, 144 So. 313; 4 Fla. Jur. 400, §74; 10 C.J.S. 758, §263. This being true, any extension agreement extending the time for payment of a loan by a bank to one or more of its officers or directors must, like the original loan, have the approval of the board of directors of the bank.

We come next to the question of whether or not an extension of a loan from a bank to one of its officers or directors is within the purview of §659.17(1), F. S., and must be granted by the board of directors. In *Lee v. Quincy State Bank*, supra, the court held that an extension of the time of payment of a promissory note was not a new contract. In said *Lee v. Quincy State Bank* the court held an extension of a note was not taxable under our documentary stamp statutes, while a renewal was taxable at that time; subsequent legislation changed this rule and exempted renewal notes from the tax. This brings us to the question of the authority of officers of a bank, other than the board of directors acting as a body, to extend the payment of loan obligations which fall within the purview of said §659.17(1). In other words, may officers of a bank extend the time for payment of a loan obligation which they could not have authorized originally? It must be admitted that an extension of the maturity of an obligation for a specified period of time accomplishes the same purpose as would a renewal, which is not permitted under said §659.17(1). We doubt it to have been the legislative intent to permit loans within the purview of said §659.17(1), to be extended by an officer or officers of the bank, when a renewal of such obligation could only be authorized by the board of directors.

It is our feeling that §659.17(1), F. S., exclusively governs loans by the state banks to their officers and directors; and that said §659.17(2), relates exclusively to bank loans to other than its officers and directors. Loans by a bank to its officers and directors, including partnership and corporations in which they are directly or indirectly interested, are not authorized by said §659.17(2), and may not be made thereunder. Section 659.17, F. S., including its subsections (1) and (2), being designed for the protection of bank depositors, stockholders and creditors, should be construed and administered so as to best serve that purpose. To permit unlimited renewals or extensions of loan obligations which must be approved by the board of directors in the first instance, would not seem to best serve the interest of the bank's depositors, stockholders and creditors. It is our thought that when the statutes require action by a board of directors of a banking institution or other corporation that official and not individual action is intended—action at a special or regular meeting of the said board of directors.

From the above and foregoing we answer questions 1, 3 and 4 in the affirmative.

Question 2 is answered in the negative for the reasons set out above.

062-4—January 12, 1962

TAXATION

HOMESTEAD EXEMPTION—RURAL AREAS—§§1 AND 7,
ART. X, STATE CONST.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

What effect, if any, does the rental of one or more dwellings, located upon a rural homestead, have upon the right of the owner to homestead tax exemption for such property?

Section 7, Art. X, State Const., provides that "every person who has the legal title or beneficial title in equity to real property in this state and who resides thereon and in good faith makes the same his or her permanent home . . . shall be entitled to an exemption from all taxation, except for assessments for special benefits, up to the assessed valuation of five thousand dollars on the said home and contiguous real property, as defined in article X, section 1, of the" Florida constitution; that is "a homestead to the extent of one hundred and sixty acres of land, or the half of one acre within the limits of any incorporated city or town . . . and the improvements on the real estate . . ." (Emphasis supplied.) With the further limitation that said exemption "in a city or town shall not extend to more improvements or buildings than the residence and business house of the owner . . ." From these observations it appears that *the amount of property that may be claimed as a homestead depends on whether the property is within or without an incorporated city or town*; if within an incorporated city or town the homestead is limited to not more than one-half acre, but if without an incorporated city or town the limitation is not more than 160 acres.

The provisions for homestead tax exemption contained in §1, Art. X, of the present constitution, is substantially the same as those contained in §1, Art. IX, 1868 Florida constitution. In *McDougall v. Meginniss*, 21 Fla. 362, which arose under the said provision of the 1868 constitution, the court remarked that the rural homestead was "without regard to the use that may be made of the portion of the tract not covered by the residence and enclosures." This quotation was quoted with approval in *Fort v. Rigdon*, 100 Fla. 398, 129 So. 847, text 848. In *Armour and Co. v. Hulvey*, 73 Fla. 294, 74 So. 212, text 214, it was held that nothing more was required than for the homesteader to live on the tract to render the homesteader the whole area (not exceeding 160 acres) exempt, "and the constitution did not prescribe the manner in which the land should be used beyond residing on it." In *Yowell v. Rogers*, 128 Fla. 881, 175 So. 772, text 773, the court remarked that "the homestead includes the land (not more than one-half acre in an incorporated town and not more than 160 acres in a contiguous body outside a municipal corporation) with the dwelling and improvements thereon." *Evidence that a homesteader rented the premises to another is not conclusive evidence of abandonment* (40 C.J.S. 656 and 679, §§175 and 198). In *Cowdery v. Herring*, 106 Fla. 567, 109 Fla. 477, 143 So. 433, 144 So. 348, 149 So. 8, the court held that even with an urban homestead the rental of certain buildings or parts thereof located on homestead property did not of itself defeat the homestead rights under circumstances as there involved. Under the terms of said §7, Art. X, Const., a homestead within an incorporated city or town may not extend

to more than the owner's residence and business house; homesteads outside of incorporated cities or towns are not so limited.

From the request for opinion it appears that the property involved consists of a block of five lots, *in a subdivision not within any incorporated municipality*, the owner residing in a dwelling located on one of said lots, renting two small dwellings located on another (lot 5) of said lots to third parties, and the remaining three lots being unimproved. Unless the homesteader, by the rental of the two small dwellings on lot five, intended to segregate that lot from the others (this being a question of fact), he would seem to be entitled to homestead tax exemption on the whole area, the same not exceeding 160 acres, not exceeding a tax valuation of \$5,000.

062-5—January 12, 1962

COUNTY SCHOOL SYSTEM

PERSONNEL—COMPETENCE AWARDS—FUNDS FROM WHICH PAYABLE—§§231.16, 236.021, F. S.

To: *Thomas D. Bailey, Superintendent of Public Instruction, Tallahassee*

QUESTIONS:

1. Suppose none of the teachers in a county elect to be evaluated for the competence award, does it become necessary or mandatory for the county to provide for such award in its budgetary expenditures?

2. Is it possible for local funds to be used in providing for competence awards to a larger group of eligible teachers than the highest 30% in a county? In other words, so long as the state funds are used entirely for the upper 30%, is it conceivable that even 50% or 60% of the teachers of a county might receive a competence award if no state funds are used above the 30%?

Sections 231.16 and 236.021, F. S., were derived from Ch. 61-263 and must be construed together in order to glean the intent of the statute in its entirety. Section 231.16(2) requires that no teacher certificate, other than a provisional or temporary certificate, shall be granted an applicant who has not made a score of at least 500 on the common examination of the national teacher's examination, or an equivalent examination prescribed by the state board of education. However, the act provides this requirement will not impair the validity of certificates dated on or prior to July 1, 1961. There is also a further proviso authorizing the state board of education to waive the examination for a three year period for teachers with previous experience.

It follows that because of the exceptions noted there are many teachers who are not required to take the examination prescribed in §231.16.

Bearing the foregoing in mind, we turn now to §236.021, authorizing competence awards. The first paragraph of §236.021(3) reads as follows:

Any person eligible for selection to receive a competence award *and who elects to become eligible* shall meet the following requirements: . . . (Emphasis supplied.)

It is apparent that the language of this paragraph is ambiguous.

It begins, "Any person *eligible* for selection to receive a competence award", then continues: "*and who elects to become eligible.*" Thus, we have statutory language providing that persons *apparently already eligible* for selection for the awards may elect to become eligible. We have been informed by responsible persons who have official duties to perform in the implementation of the subject legislation and who took part in the committee hearings concerning it, that the legislative purpose of this language—notwithstanding its ambiguity—was to afford an option to a teacher not already eligible for selection to decide whether he wanted to become eligible. Also, we have been furnished newspaper accounts appearing contemporaneously with the consideration and passage of the legislation indicating that this was the intended purpose for inclusion of the language "*and who elects to become eligible.*" Stated another way, had the words "any person" been repeated before the word "who" in the paragraph, the meaning intended would have been better expressed.

Considering both sections together, we think the word "eligible" as used in the quoted paragraph means that a teacher must have taken the examination. This word connotes something more than a mere indication by the teacher that he wishes to be considered for the award or that he would accept it if he was determined to merit it. The obvious purpose of the statute considered as a whole is to rate, advance, compensate, and reward teachers on the basis of merit which is accomplished in part by examination tests.

If a teacher has already taken the examination pursuant to the provisions of §231.16, he is "eligible" for evaluation for a competence award. But if he has not taken it pursuant to §231.16, he is given the option to take it under the quoted paragraph; and if he takes it, he becomes "eligible" for evaluation. If, on the examination, a teacher has made the score of at least 600, and is otherwise evaluated to rank in competence in the highest 30% of all teachers in the county, the teacher is entitled to be paid the competence award. However, teachers are only evaluated for competence who have taught *in the county* the preceding year.

It is our view that the act must be construed as indicated above. The wisdom or policy of legislation rests solely with the legislature.

It would appear that some appropriate regulation should be prescribed for teachers outlining a systematic method for exercising this option in order to secure uniform procedure.

It follows that question 1 is answered in the negative — assuming as we do that none of the teachers in the particular county you have in mind are eligible for evaluation or elect to become eligible for evaluation.

Question 2 is answered in the affirmative by the provision of §236.021 (2), which states:

These awards shall be paid entirely from state funds and shall be in addition to all other salary allotments and requirements and nothing in this section shall be construed as prohibiting or discouraging any county from paying other increments from funds or from maintaining a sound salary schedule.

062-6—January 16, 1962

TAXATION

EXEMPTIONS—HISTORICAL SOCIETIES—ST. AUGUSTINE
HISTORICAL SOCIETY—§1, ART. IX, §1, ART. XVI,
STATE CONST.; §192.06, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

When are historical societies, such as the St. Augustine historical society, entitled to tax exemption, if at all?

Exemptions from ad valorem taxation, other than those specifically provided in the Florida constitution, are those authorized under §1, Art. IX, and §16, Art. XVI, State Const., under which sections of the said constitution tax exemptions provided by the legislature are limited to "property held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes." Section 1, Art. IX, State Const., has been referred to by the courts as a limitation upon the legislative power to exempt from taxation any class of property except those particularly specified in the constitution (*L. Maxcy, Inc., v. Fed. Land Bank*, 111 Fla. 116, 150 So. 248, text 250; *State v. St. John*, 143 Fla. 544, 197 So. 131, text 134; *State v. Doss*, 146 Fla. 752, 2 So. 2d 303, text 304). From these authorities and §192.06, F. S., only such property of a historical society as is held and used exclusively for some religious, scientific, municipal, educational, literary or charitable purposes may be granted tax exemption. This is largely a question to be determined from the applicable facts and circumstances, by the tax assessor.

In the request for opinion, the St. Augustine historical society is mentioned. Subsequent to receiving the request for opinion, we have been furnished certain material by the society itself from which it appears that: (1) The said society is the outgrowth of a movement beginning in 1883 with certain persons interested in archaeology and natural history, resulting in the incorporation of the St. Augustine institute of science and historical society, around 1898, which began to accumulate books, specimens and relics relating to the history and growth of the Floridas prior to statehood in 1845, as well as subsequent thereto. Later the St. Augustine institute of science and historical society became the St. Augustine historical society. We have been furnished with a copy of the charter of the said society, as amended from which it appears that the society's business and purpose is "to bring together those people who are dedicated to the preservation and accurate presentation of the rich history of St. Augustine and Spanish colonial territory in the western hemisphere, and constantly to endeavor to foster a greater interest in, and appreciation of this priceless heritage among the people of St. Augustine, the state and the nation. Understanding of the history of our community is basic to our democratic way of life, gives us a better understanding of our state and nation, and promotes a better appreciation of our American heritage." It further appears from said charter that "the corporation's major function will be to present and interpret the history of St. Augustine and environs, to maintain a library and museums, and to discover and collect any material which may help to establish and illustrate the history of the area, its exploration, settlement, development and activities in peace and in war . . .

It will collect printed material such as histories, genealogies, biographies, descriptions, brochures, directories, newspapers, pamphlets, catalogs, circulars, handbills, programs and posters . . . dealing with St. Augustine and Spanish colonial territory in the western hemisphere." Among the duties of the society under its charter is to make available such material "to all who wish to examine and study it, to cooperate with officials in insuring the preservation and accessibility of the records and archives of the county and its cities, towns, villages and institutions, and undertake the preservation of historic buildings, monuments and markers, and historic sites." Many like and similar purposes are mentioned in the said charter.

From the society's literature furnished us it is made to appear that it "has acquired an outstanding specialized library on the history of St. Augustine and its environs. It is open for the use of interested persons, both scholars and laymen." The above and foregoing clearly indicates that the purposes of the society is public information and education concerning the history of St. Augustine, and Spanish territorial functions in North America. Historical societies have been held under proper circumstances to be tax exempt (84 C.J. 561 and 571, §§282, note 52, and 285, note 15). Many of the purposes mentioned in the charter of the St. Augustine historical society relate to public and private education relative to the history of St. Augustine and Florida under Spanish and American domination; this shows an educational purpose. This is true of the operation of the society if found by the tax assessor to be nonprofit and being so operated it will be entitled to tax exemption. The fact that its employees and officers may be paid a reasonable compensation will not defeat its right to exemption so long as its operations are primarily for educational purposes as to the history of St. Augustine, Florida, and Spanish rule in North America. The society appears to have been issued an exemption certificate by the comptroller, under the sales tax statutes, on May 20, 1950, and a similar exemption by the wage and excise tax division of the U.S. treasury department on Nov. 20, 1951.

Historical societies, such as the St. Augustine historical society, are entitled to tax exemption when, and only when, the property claimed to be exempt is held and used exclusively for some religious, scientific, municipal, educational, literary or charitable purpose. The education feature concerning the use of the property of the St. Augustine historical society has been discussed above. The question is largely one of fact, of whether the property claimed to be tax exempt is held and used exclusively for one or more of the purposes mentioned, to be determined by the tax assessor, under the rules above mentioned.

062-7—January 15, 1962

DIVISION OF SUNLAND TRAINING CENTERS
CREATION—APPOINTMENT AND QUALIFICATION OF DI-
RECTOR—ESTABLISHMENT OF CENTERS IN GAINES-
VILLE, ORLANDO AND LEE COUNTY—CHS. 61-425
AND 61-426, LAWS OF FLORIDA; CH. 965, F. S.

To: *J. Edwin Larson, State Treasurer, Tallahassee*

QUESTIONS:

1. In view of the lack of a specific appropriation

for implementing Ch. 61-425, is it mandatory that the board create the division of sunland training centers and make provision for a director and the staff personnel as outlined in the wording of the act?

2. Although Ch. 61-425 specifically provides that the director shall not also serve as a superintendent of a sunland training center, would the board be within its legal rights if it should decide to implement or find it mandatory to implement this statute in appointing the director of an existing division as director of this division also?

3. Is any action required on the part of the board of commissioners of state institutions for Ch. 61-426 to become effective?

4. Since no director of a sunland training center has been designated by the board of commissioners of state institutions and the commitments thus far in 1962 have been on the regular prescribed form to a sunland training center, are these commitments valid?

AS TO QUESTION 1:

Chapter 61-425, amending §§965.01 and 965.03, F. S., is mandatory in its provisions and requires the board of commissioners of state institutions to establish the division of sunland training centers with jurisdiction over the centers at Gainesville, Lee county, and Orlando. Chapter 965, F.S., as amended, requires said board to appoint (employ) a director to serve as the administrative head of each of the divisions created by Ch. 965, including the newly created division of sunland training centers. We think this legislative directive is mandatory and the lack of a specific legislative appropriation to implement the directive is immaterial. Funds appropriated for the existing institutions or centers can be legally used to carry into effect the 1961 legislative directive, inasmuch as Ch. 61-426, a cognate act to chapter 61-425, provides that all appropriations "which have hereto or shall hereafter accrue for the said (*predecessor*) centers shall accrue to the benefit of the division of sunland training centers.

Unless it can be shown by certification from the budget commission that there are not sufficient funds available in said source to implement the changes, the changes should be made. Consequently, we feel the answer to question 1 is in the affirmative, unless such clear showing of lack of funds can be made.

AS TO QUESTION 2:

While legally it is possible, but not mandatory, for the board of commissioners of state institutions to name the same individual to the directorship of the division of the sunland training centers who is now serving as director of another division under the board, since there is no prohibition to such action, such a step is one that should be taken with the greatest caution, if at all, because of practical and professional considerations.

In the selection of the director for said division it appears that the board of commissioners of state institutions would be required to determine the qualifications of the applicant for that position based upon particular education, training and experience in the highly specialized field of the mentally retarded, feeble-minded and exceptional children. The proviso of said section to the effect that such director shall not also serve as a superin-

tendent of a *sunland training center* appears to be a legislative recognition that the division director should operate in a top supervisory capacity over the entire division without the burden of the details involved in the supervision of a particular training center.

In a program as complex and important as the care and training of mentally retarded, feeble-minded and exceptional children, we have serious doubt that one individual would have sufficient time to properly carry out the responsibilities attendant with the position of director of the division of sunland training centers, as well as the responsibilities in connection with the administration of the other divisions established by the legislature in Ch. 965. Not unmindful that some minor savings of public funds might be effected by a unity of directorships of two divisions because only one salary would be paid, it would appear that the benefits derived from such savings are far overshadowed by the probable detriment to the sunland training centers' program which could thereby result.

Our answer to question 2, is in the affirmative; nevertheless, my suggestion is that your committee carefully weigh the advisability of a dual appointment because of the practical and professional obstacles involved. Should a dual appointment be made, the individual appointed is required to have the requisite qualifications prescribed in the act for the director of the sunland training centers. This requirement may present professional as well as practical handicaps very difficult to surmount. Only in the event your subcommittee believes the practical, as well as the professional, obstacles can be successfully overcome — should a dual appointment be made in view of the language in Ch. 61-425. If a dual appointment is made, a very clear and convincing policy pronouncement should be issued justifying it.

AS TO QUESTION 3:

Chapter 61-426 is complete in itself. It establishes the sunland training centers at Gainesville, Orlando, and in Lee county without the necessity of any implementing action on the part of the board of commissioners of state institutions. The answer is in the negative.

AS TO QUESTION 4:

Chs. 61-425 and 61-426 became effective Jan. 1, 1962. These statutes should already have been activated so as to have met the Jan. 1, 1962 deadline. Although this should have been done of necessity, prior commitments to the centers rather than to the director occurring since Jan. 1, 1962 would in all probability be honored in case of habeas corpus action, provided such commitments are ratified by the new director of the sunland training centers immediately upon his appointment. Our answer, as conditioned, is in the affirmative.

062-8—January 16, 1962

DOG AND HORSE RACING

CHARITABLE AND SCHOLARSHIP FUNDS—CONSTRUCTION OF §§550.03 AND 550.08, F. S.

To: *Florida State Racing Commission, Miami*

QUESTIONS:

1. Does the proviso at the end of §550.03, F. S., and the like provision in §550.08, F. S., provide for a

charity fund or funds composed of profits, plus a sum equal in amount to normal taxes on races, or merely of profits?

2. How are "profits" determined, as the same is used in §§550.03 and 550.08, F. S.?

The answers to the above stated questions depend upon a construction of the following language used in §§550.03 and 550.08, F. S.:

That the total of all profits derived from the operation of such racing on such charity day *including all moneys which would otherwise be received by the state racing commission as taxes for such day's operation shall be and become* a part of the charity trust fund for which such racing on such days is conducted. (Emphasis supplied; §550.03, F. S.) and, All profits, less actual operating costs, from such specific day's operations of such track, *including all taxes payable to the state or any agency thereof* for such day's operation shall be paid into the state treasury for a scholarship trust fund. (Emphasis supplied.)

The above quoted proviso in §550.03, F. S., originated in §1, Ch. 20843, 1941, said proviso having first provided that "the total of all profits derived from the operation of such racing on such day *including all taxes which would otherwise be received by the state racing commission from such day's operation.*" (Emphasis supplied.) This language was changed by Ch. 57-283, so as to provide "that the *total of all profits* derived from the operation of such racing on such charity day *including all moneys which would otherwise be received by the state racing commission as taxes for such day's operation* shall be and become a part of the charity fund for which such racing on such day is conducted." (Emphasis supplied.) This provision was further amended by Ch. 61-119, which changed the phrase "charity fund" to "charity trust fund," but made no further change.

The provision, in §550.08, F. S., for an extra day of racing for the benefit of the scholarship trust fund, originated by amendment to §550.08, made by Ch. 25258, 1949, which provided in part that "all profits, *less actual operating costs, from such specific day's operations of such track including all taxes payable to the state of Florida or any agency thereof for such day's operation* shall be paid into the state treasury for a scholarship fund . . ." (Emphasis supplied.) This provision was amended slightly by §2, Ch. 61-119, by changing the phrase "state of Florida," to "the state" and the phrase "scholarship fund" to "scholarship trust fund," which amendment affected no change in substance in the said provision.

We come next to the construction of the provision, in §550.03, that the total of *all profits* derived from the operation of such racing on such charity day *including all moneys which would otherwise be received by the state racing commission as taxes for such day's operations* shall be and become a part of the charity trust fund . . ." And to the provision, in §550.08, F. S., that "all profit, less actual operating costs from such specific day's operation of such track, *including all taxes payable to the state or any agency thereof for such day's operation* shall be paid into the state treasury for a scholarship trust fund. . . ." (Emphasis supplied.) These provisions in said §§550.03 and 550.08, F. S., seem to be in substance the same.

"In construing a statute effect must be given to every part, if it be reasonably possible to do so. Each part or section should be construed in connection with every other part or section so as to produce a harmonious whole. A mere literal construction of a part of a statute ought not to prevail if it is opposed to the intention of the legislature apparent by the statute, and, if the words are sufficiently flexible to admit of some other construction, it is to be adopted to effectuate the intention." (*Ozark Corp. v. Pattishall*, 135 Fla. 610, 185 So. 333, text 337). "It is the general rule, in construing statutes, 'that construction is favored which gives effect to every clause and every part of the statute, thus producing a consistent and harmonious whole. A construction which would leave without effect any part of the language used should be rejected, if an interpretation can be found which will give it effect.'" (*Snively Groves, Inc., v. Mayo*, 135 Fla. 300, 184 So. 839, text 841). In *Chiapetta v. Jordan*, 153 Fla. 788, 16 So. 2d 641, text 644, the court recognized two principles of statutory construction, the "substance of one is that all parts of an act must be considered and harmonized so that the whole scheme may be made effectual; the other that all parts of a law should be preserved. Withal it is the duty of the court to follow the cardinal rule that it is the legislative intent which in the final analysis must govern." Further, "a statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage or superfluous, meaningless, void, insignificant or nugatory, if that result may be avoided . . ." (82 C. J. S. 712, §346).

In *Jacksonville Terminal Co. v. Blanchard*, 77 Fla. 855, 82 So. 300, text 301, the court, construing the term "including," as used in the following sentence, "all costs of proceeding shall be paid by the petitioner, including a reasonable attorney's fee," as a "word of enlargement, and in this sense is equivalent to 'and.'" In *Arnold v. Arnold*, 193 Or. 490, 237 P. 963, text 969, the court, concerning a statutory grant of power, said that "in ordinary signification the word 'including' implies that something . . . has been given beyond the general language which precedes it." In *Johnson v. Monson*, 183 Cal. 149, 160 P. 635, text 636, the court construed the word "including," located between two parts of a sentence, as being the equivalent of "and also" or "as well as." In *U.S. v. Gertz*, CCA 9th., 249 P.2d 663, text 666; *Koenig v. Johnson*, 71 Cal. App. 2d 739, 163 P. 2d 746, text 750; *People v. Western Air Lines*, 42 Cal. 2d 621, 268 P. 2d 723, text 733; *El Paso Electric Co. v. Safeway Stores*, Tex. Civ. App., 257 S. W. 2d 502, text 506; it was considered that the words "include" or "includes," when used in a statute, "is usually a term of enlargement, and not of limitation." In this same connection we should keep in mind that a liberal construction is generally given to a statute having for its end the promotion of important and beneficial public objects. Such statutes should receive such construction as will effect their object. (50 Am. Jur. 420, §395). Sometimes the words "include" and "including" are used as words of limitation instead of words of enlargement. (20A Words and Phrases, 155-157); however, the context of said §§550.03 and 550.08, F. S. seems to indicate an enlargement instead of a limitation upon the moneys going into the charity trust fund.

When seeking the legislative intent of a statute courts often take into consideration all the facts and circumstances existing at the time of, and leading up to its enactment, such as the history

of the times (82 C.J.S. 739, et seq., §352). At the time of the enactment of Chs. 20843 and 25258, 1941 and 1949, first making provision for special days of racing, taxes were being collected on bets made through pari-mutuel pools provided by law, the provision for the extra days of racing for charitable purposes, posed the question of the disposition of such "taxes" when the profits from the extra days of racing were to be allocated to charity and scholarships. The statutory provision "that the total of all profits derived from the operation of such racing on such charity day *including* all moneys which would otherwise be received by the state racing commission as taxes . . ." In §550.03, and the provision that "all profits, less actual operating costs, from such specific day's operations of such track including all taxes payable to the state . . . shall be paid into the state treasury for a scholarship trust fund. . ." seems material. Section 550.08 seems to show an intention on the part of the legislature to enlarge the charity and scholarship trust funds by adding thereto a sum equal to the taxes that would otherwise have been paid. This seems to have been the view of the court, in *State v. Florida State Racing Comm., Fla., 70 So. 2d 375*, text 379, when it stated that "the excise ordinarily paid by the race tracks to the state *goes into the profits and the quoted statutes* exempt the race tracks, which voluntarily run the extra day, from the payment of the tax, and *instead direct the proceeds* to charitable and educational purposes in the manner provided." Although §550.162, F. S., provides for a daily operational cost allowance for racing as therein provided, it is noted that subsection (4) of said section provides that "nothing in this section shall be construed so as to allow any dog track in this state an 'initial expense of operation' allowance as provided herein for any day on which races may be held for the benefit of educational scholarships or charitable organizations." The purpose and intent of this subsection is clear and needs no construction.

We come next to the question of how are the "profits," as used in §§550.03 and 550.08, F. S., to be determined. Section 550.03 provides that "the total of all profits derived from the operation of such racing . . ." shall be paid into the charity trust fund; and §550.08 that "all profits, *less actual operating costs* . . . shall be paid into the state treasury for a scholarship trust fund." (Emphasis supplied). The two sections relate to extra days of racing and the creation of trust funds for a public purpose, and doubtless were intended to accomplish the same type of purpose. It was doubtless the legislative intent to measure "profits" by the same rule in both §§550.03 and 550.08. Profits should be measured under both sections by the income less actual operating costs. This brings us to the question of *what are actual operating costs*, as contemplated by said §550.08, F. S. In 9 Am. Jur. 521, §135, the statement is made that "the operating expenses of a carrier, considered as a factor in determining the reasonableness of rates, is usually understood as referring to and including all items of cost or expense incident to the actual handling and movement of the traffic, as distinguished from fixed charges." In *Lindheimer v. Ill. Bell Tel. Co., 292 U.S. 151, 54 S. Ct. 658, 78 L. ed. 1182*, text 1193, the court defined operating expenses as "the cost of producing service." In *People v. Reilly Tar and Chem. Corp. 389 Ill. 434, 59 NE 2d 843*, text 846, the court held that operating expense did not include the purchase of typewriters, desks, chairs, or other equipment, which

are capital investments. Operating expenses usually include physical maintenance (*Powell v. San Francisco*, 62 Cal. App. 2d 291, 144 P. 2d 617, text 621). The test of whether an expenditure is a business expense or an operating expense is determined by whether the expenditure was made to maintain the property or to maintain normal production (47 C.J.S. 280, §153). In *Black Hdw. Co. v. Comm.*, CCA, 39 Fed. 2d 460, and *George H. Bowman Co. v. Comm.*, App. D. C., 32 Fed. 2d 404, it was held that the cost of improvements and betterment were not business expenses.

The phrase "less actual operating costs" as used in §550.08, F. S., and the reference to "profits" in said section and §550.03, doubtless refers to the actual operating costs of the race tracks, as distinguished from capital expenditures, as above discussed. When determining sums going to charity and scholarships, under §550.03 and 550.08, F. S., only the actual operating costs may be deducted, not capital expenditures.

From a reading of Ch. 550 as a whole, with §§550.03 and 550.08 F. S., as construed above, the commissions normally going to the state under said sections (8% as to horse races and 7% as to dog racing), should be paid into the respective trust funds before calculating the profits. The sums paid for admissions and breakage should also be paid into the said trust funds. The profits to be paid into the said trust funds under said §§550.03 and 550.08, F. S., would seem to be the race track's portion of the income for the day of racing less actual operating expenses as above defined. The same principle should also be followed as to jai alai, when calculating the portion thereof going into the trust fund.

In auditing and determining the "actual operating costs" to be deducted from the race track's portion of the commissions as fixed by statute, the actual operating costs mentioned, mean and extend only to the costs and expenses incurred by the race track by reason of the holding of the said race, and should not be deemed to include expenses constant from day to day and which would have been incurred had the race on that day not been held. Ad valorem taxes, general license taxes, officers and directors salaries, and other items of expense on an annual, monthly or weekly basis should not be included, as they are incurred whether the race is run or not. These observations answer question 2.

Having reached the conclusion that our opinion of Aug. 20, 1956 (056-243; 1955-1956 AGO 780) was a correct construction of the applicable statutes, the said opinion is hereby approved and confirmed.

062-9—January 16, 1962

TAXATION

HOMESTEAD TAX EXEMPTIONS—PURCHASE CONTRACTS—FORFEITURE PROVISIONS—§7, ART. X, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

May a vendee in possession under a contract for the purchase of real property, containing a recision or forfeiture clause for nonpayment of installments or payments, claim homestead tax exemption based on such a contract?

A vendee in possession under ordinary contract of sale and

purchase of real property holds a beneficial title in equity to such lands, within the purview of §7, article X, State Const., and, upon the recording of the said contract prior to the tax day, is entitled to tax exemption if he complies with the other requirements of said §7, Art. X. The contract handed us with your said request for opinion provides in part that "in the event of any default by the buyers in any way of the payments to be made by them at the time specified, or any other breach of the covenants by them to be performed, all payments which have been made hereunder shall be considered as rent on the above described premises to the date of default or breach of covenants as aforesaid, and all payments in arrears shall be treated and considered as rent therefor for said premises, and the sellers shall have all rights as landlord with respect to said property at their option, including the right and authority to possession of said property in such manner as shall be authorized for the removal of a tenant for failure to pay rent or tenant at sufferance, or otherwise, and that the sellers may re-enter said premises, and immediately thereupon re-take possession thereof, the buyers to save harmless the sellers and to indemnify them for any costs and expenses, including attorney's fees which may be reasonably necessary to retake possession.

Such clauses, as well as similar clauses, are not unusual in such purchase contracts, and are intended for the benefit of the vendor "which he may enforce under some conditions or waive at his pleasure. It is a penalty or forfeiture clause which under some conditions it would be inequitable for the vendor to enforce, and in which a court of equity would deny him such privilege" We find no case, text book, or encyclopedia or other legal work holding that a contract for the sale and purchase of real property is rendered void ab initio by the inclusion of a provision for rescision or forfeiture of the contract because of non-payment. If there is to be a rescision or forfeiture of the contract it does not become void, for such reason, until after the default in payments. It is subsisting and effective unless void for other reasons until occurrence of the default in payment.

The above question is answered in the affirmative.

062-10—January 17, 1962

COURTS

OFFICERS WHO ARE CONSERVATORS OF THE PEACE—
POWERS AS COMMITTING MAGISTRATES—§§25, 1, ART. V,
STATE CONST; §901.01, F. S.

To: *Robert T. Adams, Jr., Office of County Solicitor, Fort
Lauderdale*

1. What judicial officers of this state are authorized by §25, Art. V, State Const., to act as conservators of the peace?

2. Do all such officers authorized to act as conservators of the peace have the power of committing magistrates?

Section 25, Art. V., State Const., having been revised and readopted in 1956, provides that "all judicial officers of this state shall be conservators of the peace." This provision is identical with §36, Art. V, State Const., prior to the said 1956 revision. This provision has been a part of the Florida Constitution since its

adoption in 1885. Section 14, Art. V., Const. of 1838, and §13, Art. V. Const. of 1861, provided that "justices of the supreme court, chancellors and judges of the circuit courts, shall, by virtue of their offices, be conservators of the peace throughout the state, and justices of the peace in their respective counties." Section 16, Art. V, Const. of 1865, provided that "justices of the supreme court, chancellors and judges of the circuit courts, shall, by virtue of their offices, be conservators of the peace throughout the state." The reference to the justices of the peace above referred to in the 1838 and 1861 constitution was omitted from the 1865 constitution.

It was provided in §1, Art. V, of the Florida Constitution, at the time of its adoption in 1885, that "*the judicial power of the state shall be vested in a supreme court, circuit courts, criminal courts, county courts, county judges and justices of the peace.*" This section was amended in 1914 so as to provide that "*the judicial power of the state shall be vested in a Supreme Court, Circuit Courts, Court of Record of Escambia County, Criminal Courts, County Courts, County Judges and Justices of the Peace and such other Courts or Commissions as the legislature may from time to time ordain and establish.*" (Emphasis supplied.) This amendment extended the judicial powers of the state so as to include the court of record of Escambia county, and "such other courts and commissions as the legislature may ordain and establish." Under the 1956 amendment of Art. V, State Const., *the judicial power of the state is vested in "a supreme court, district courts of appeal, circuit courts, court of record of Escambia county, criminal courts of record, county courts, county judges courts, juvenile courts, courts of justice of the peace, and such other courts, including municipal courts, or commissions as the legislature may from time to time ordain and establish."* This amendment added the district courts of appeal, juvenile courts and municipal courts to the courts having judicial power in this state.

Section 1, Art. V, State Const., states that the judicial power of the state is vested in certain specified courts established under the constitution and such other courts, including municipal courts, as the legislature may from time to time ordain and establish, thereby vesting in such courts some of the judicial powers of the state. In *Farragut v. Tampa*, 156 Fla. 107, 22 So. 2d 645, text 647, the court referred to *McDaniel v. Harrell*, 81 Fla. 66, 87 So. 631, 13 A. L. R. 1333, and stated that "this decision clearly recognizes that judges of municipal courts are judicial officers." For definitions of judicial power see "judicial power" in Black's law dictionary; 50 C.J.S. 569-571; 14 Am. Jur. 363, §160; and "judicial power" in Black's law dictionary; 50 C. J. S. 569-571; 14 Am. Jur. 363, §160; and "judicial power" in 23 Words and Phrases.

The term "judicial power" relates to the nature of the act to be performed rather than to the officers, boards and bodies which perform it, which determines the character of the power as judicial or otherwise. (*Florida Motor Lines v. Railroad Comm.*, 100 Fla. 538, 129 So. 876, text 882). Whether a function is judicial or quasi judicial must be determined from its essential nature and attributes and the law applicable thereto. (*Florida Motor Lines v. Railroad Comm.*, supra; 14 C. J. S. 145, §17). The power to hear and determine, although undoubtedly a part of the judicial power, if exercised by a court, may, in appropriate situations, be exercised by an administrative agency as an administrative or quasi judicial

function (1 Fla. Jur. 275, §58; Fla. Motor Lines v. Railroad Comm., supra, southern text 881; State v. Atlantic Coast Line Railroad Co., 56 Fla. 617, 47 So. 969, text 975). In the latter case the court said that "the exercise of some authority, discretion or judgment may be incident or necessary to the performance of administrative or ministerial duties; but such authority, discretion or judgment is subject to judicial review, and is not among the powers of government that the constitution separates into departments." A distinction is drawn between judicial power and quasi judicial power (50 C. J. S. 564, notes 95-99; 23 Words and Phrases 315, "quasi judicial acts" and supplement). The court in Florida Motor Lines v. Railroad Comm., supra, southern text 882, stated that the administrative authority, functions and duties vested by the statutes in the railroad commission of this state "are not among 'the powers of government' which are by the constitution separated into legislative, executive and judicial 'powers' and which must be exercised only by appropriate officers 'properly belonging to' one of the three departments of government of the state of Florida." In Batty v. Ariz. State Dental Board, 57 Ariz. 239, 112 P. 870, text 873, it was stated that the difference between "judicial power" and "quasi judicial power" is that the "judicial power" strictly speaking is vested only in a court. In this connection see also Hoyt v. Hughes County, 32 S. D. 117, 142 N. W. 471, text 474; Conover v. Gatton, 251 Ill. 587, 96 N. E. 522, text 523; Keller v. Ky. Alcoholic Bev. Control Board, 279 Ky. 272, 130 S. W. 2d 821, text 824; State v. Board of Comm., 188 Okla. 184, 107 P. 2d 542, text 549). Under these authorities the reference to judicial officers used in §25, Art. V, State Const., defining who are conservators of the peace, have reference to those state officers exercising judicial functions and do not include those exercising quasi judicial functions only.

Section 901.01, F. S., provides that "all judicial officers of this state shall be conservators of the peace and committing magistrates, and may issue warrants against persons charged on oath with violating the criminal laws of the state. . . ." Doubtless this statute was designed to embrace the same group of judicial officers mentioned in §25, Art. V, State Const., as constituting conservators of the peace. This office on Dec. 1, 1946 (046-493; 1945-6 AGO 738), after discussing *Farragut v. Tampa*, supra, held that in its opinion judges of municipal courts were not judicial officers within the purview of said §901.01, F. S. This opinion was rendered prior to the 1956 amendment of Art. V, State Const., whereby municipal courts were added to §1, Art. V, as one of the courts being vested with judicial powers of the state.

The judicial powers of this state, being vested in the supreme court, district courts of appeal, circuit courts, court of record of Escambia county, criminal courts of record, county courts, county judge's courts, juvenile courts and courts of justice of the peace, as constitutional courts, their justices and judges are doubtless judicial officers within the purview of §25, Art. V, State Const., and §901.01, F. S., and as such, committing magistrates. Section 1, Art. V, State Const., further declares that the judicial powers of the state likewise are extended to "such other courts, including municipal courts, and commissions, as the legislature may from time to time ordain and establish." However, we are of the opinion that only judicial powers, and not quasi judicial powers, are included here. This would seem to exclude most boards and commis-

sions, as they are usually at most vested with quasi judicial powers and not strict judicial powers; however, there have been established several statutory courts in this state vested with undoubted judicial powers, such as the court of record of Broward county, having both civil and criminal jurisdiction; the civil court of record of Dade county; the civil court of record of Duval county; the civil and criminal court of record of Pinellas county; and others, including small claims courts, which seem to exercise judicial functions as distinguished from quasi judicial functions. Most, if not all, of these statutory courts are vested with powers exercised by constitutional courts prior to their creation by the legislature, although in some instances they may have a concurrent jurisdiction with such constitutional courts, or some of them.

We, therefore, hold that justices or judges of the supreme court, district courts of appeal, circuit courts, court of record of Escambia county, criminal courts of record, county courts, county judge's courts, juvenile courts and courts of justice of the peace, the same being constitutional courts, are clearly judicial officers authorized to act as conservators of the peace and as committing magistrates. We are also inclined to the view that statutory courts, existing under and pursuant to §1, Art. V, State Const., are also judicial officers authorized to act as committing magistrates, as are also judges of municipal courts authorized to act as conservators of the peace and committing magistrates.

We believe the policy of our state constitution in this regard is to invest in all said courts said powers in order that law officers on the one hand may have access to a sufficient force of available magistrates to whom application for warrants may readily be made in the conservance of the peace and enforcement of law, and on the other hand in order that persons arrested may have ready access to available magistrates for early commitment and determination of bond and probable cause without undue delay or unnecessary detention. Recent judicial pronouncements of highest appellate courts emphasize the importance of minimizing undue delay in the committal process.

Your questions are answered in the affirmative.

062-11—January 18, 1962

TAXATION

DOCUMENTARY STAMP TAXES—NOTES SECURED BY TRUST RECEIPTS—CONDITIONAL SALES OF MOTOR VEHICLES—§§201.01, 201.08; CHS. 673, 201, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTIONS:

1. When are conditional sales agreements, evidencing the sale of motor vehicles, from a customer to a motor vehicle dealer in Georgia, discounted and assigned to a finance company doing business in Florida, subject to documentary stamp taxes under Florida statutes?

2. When are promissory notes made in Georgia, and secured by a trust receipt encumbering motor vehicles, subject to documentary stamp taxes under Florida statutes?

The above questions arise because of conditional sales contracts, made and entered into in Georgia, between a motor vehicle dealer

and his customer, being discounted with a finance company and assigned to said company; and a promissory note from a motor vehicle dealer to a finance company doing business in Florida, secured by a trust receipt encumbering motor vehicles located in Georgia. Had the conditional sales contracts and promissory note secured by a trust receipt been made and delivered in Florida, doubtless they would be subject to taxation under §201.08, F. S., and shall be so considered for the purposes of this opinion. The above questions pose the question of whether or not, because of the Florida finance company, the conditional sales contracts and promissory notes secured by trust receipt, have acquired a tax situs in Florida.

Since the statutes and laws of a state do not operate beyond its jurisdictional limits, the taxing power of a state is limited to persons, property and transactions within and subject to its jurisdiction (84 C.J.S. 61 and 62, §11; 51 Am. Jur. 87 and 88, §§58 and 59; 1 Cooley on Taxation, 4th ed., 218-221, §92). Section 201.01, F. S., purports to impose an excise tax on specified documents, instruments and writings which are "written or printed by any person who makes, signs, executes, issues, sells, removes, consigns, assigns or ships the same, or for whose benefit or use the same is made, signed, executed, issued, sold, removed, consigned, assigned or shipped in the state." (Emphasis supplied.) In *State v. Gay*, Fla., 90 So. 2d 132, text 136, it was held that where no "single aspect of the transaction essential to the authorization, execution, sale and delivery of the bonds took place within the limits of the State of Florida, the issuance of these bonds was not subject to the imposition of the Florida documentary stamp tax." This case holds with the above authorities that the taxing power of the state is limited to persons, property and transactions taking place within Florida, in whole or in part. In *State v. Gay*, supra, the court further stated that it was of the view that the Florida documentary stamp statute "is more nearly of the nature of a transaction tax that is imposed upon the particularly described transaction *when it occurs within the limits of this state.*" (Emphasis supplied).

In *State v. Gay*, supra, the court, citing *Graniteville Mfg. Co. v. Query*, 283 U. S. 376, 51 S. Ct. 516, 75 L. ed. 1126, with approval, described the tax in question as being "of a familiar sort, levied with respect to the creation of instruments. . . . It is simply a tax levied in relation to an act done within the state in making an instrument." In *Plymouth Citrus Growers Ass'n v. Lee*, 157 Fla. 893, 27 So. 2d 415, the court, considering the taxability of a promissory note, stated that "the documentary stamp tax is an excise tax on the promise to pay." In *North American Co. v. Green*, Fla., 120 So. 2d 603, text 608, the court dealing with taxation of transfers of corporate stock, remarked that "the tax is imposed on the transferring transaction on the basis of fixed rate per share." On text p. 610, the court further remarked that the transfer transaction "is not completed until title to the subject matter of the transfer reaches the transferee."

The conditional sales contracts.—We gather from the documents and information before us, including a copy of the conditional sale contract forms used, that certain motor vehicle dealers, doing business in Georgia, have some kind of arrangements with the General Motors Acceptance Corp., which maintains one or more business offices within Florida, for the discount and purchase of the conditional sales contracts derived from their motor vehicle

sale made in Georgia. These conditional sales contracts evidence the sale of described motor vehicles, showing the purchase price, the down payment, the finance charges, and the time and manner of payment. These contracts provide that such payments are "payable at the seller's office," its location appearing from the contract. These conditional contracts are executed by the purchaser or purchasers and the seller; they also provide for enforcement in case of default. On the bottom of these contracts, evidently not a part of the contract by and between the seller and the purchaser, appears a seller's recommendation, assignment and guaranty of the contract; so far as the file shows the purchaser of the motor vehicle is not a party to this instrument; apparently, it is executed only by the motor vehicle dealer and directed to the finance corporation. Nowhere in the file do we find any evidence that the purchaser is made a party to this recommendation, assignment and warranty. So far as we are advised the acceptance corporation's relation to the conditional sales contract is merely that of an assignee. The purchase transaction between the motor vehicle dealer and the purchaser appears to be complete and closed before it is assigned to the acceptance corporation.

New car floor plan agreement.—We have examined the so-called "new car floor plan agreement" forms handed us with the request for opinion, for which it appears that the so-called plan is in law a trust receipt within the uniform trust receipt act, the same having been adopted by the legislature of Florida in 1951, now appearing as Ch. 673, F.S. Although adopted in some 35 states of the Union, it appears that the act has not been adopted in Georgia, unless at the current session of the legislature of that state. The file handed us with the request for opinion indicated that under the General Motors Acceptance Corp. plan, the motor vehicle dealer seeking to come under the corporation's new car floor plan, makes and delivers to the corporation a promissory note, payable on demand, with interest as therein provided, and secures the same with a so-called trust receipt encumbering specified motor vehicles. A "trust receipt" is an instrument whereby the person or corporation advancing money for the purchase of merchandise takes and retains title thereto in his own name, as security until the amount advanced has been repaid, and delivers possession of the merchandise to the customer to hold in trust for the person or corporation advancing the money until the same is paid. The transaction is regarded by some decisions of the courts as a mortgage. Such contracts appear to have been recognized by the Georgia courts in *General Motors Acceptance Corp. v. Dunn Motors*, 43 Ga. App. 275, 158 S. E. 626, 172 Ga. 400, 157 S. E. 627, as valid. Trust receipts were held to be common law mortgages in *Smith v. Commercial Credit Corp.* 113 N. J. Eq., 12, 165 A. 637, 115 N. J. Eq. 310, 170 A. 607.

Our opinion of March 25, 1958 (058-106; 1957-1958 AGO 613) appears to be subject to more than one construction, one of which would impose the tax upon taxable documents removed, consigned, *assigned or shipped into Florida from without said state*, whether in connection with the making, execution and delivery thereof or not, the other of which would impose the tax only when the taxable document is removed, consigned, assigned or shipped into the state in connection with the making, execution and delivery thereof. We do not think that every transfer of a promissory note from without

into Florida was intended by the legislature to be taxed. If such were the case the sending of promissory notes into the state for purposes of collection would be subject to taxation; this, we do not think that the legislature intended. A promissory note made and completed in Georgia, subject to its approval in Florida, would seem to be subject to the tax, as the approval in Florida would be a part of the transaction creating it.

As to the conditional sales agreements mentioned in question 1, they involve transactions between certain motor vehicle dealers, doing business in Georgia, and their customers, such conditional sales agreements being concluded, and the same reduced to writing and executed by both the dealer and customer, prior to the assignment and transfer of such document to a Florida finance company. There is no evidence in the file before us that even tends to show that the finance company is a party to such conditional sales agreements. The fact that there may be an agreement between the motor vehicle dealer and the finance company under which the finance company binds itself to purchase such agreements from the dealer would not be sufficient to make such finance company a party to the conditional sales agreement. The fact that the finance company loans the dealer money on such agreements would not for that matter alone make it a party to the conditional sales agreement. From aught appearing from the file before us the conditional sales agreements are entirely Georgia contracts; there is no showing of any requirement that such agreements be approved by the finance company before they become binding instruments, so far as the record shows the transaction is entirely entered into and executed in Georgia, by and between the dealer and his customer. *So far as the record before us shows, the assignment and delivery of the agreements to the finance company by the dealer are separate and independent of the purchase transaction.* Even if the finance company were a party to the conditional sales agreement, it would not be taxable in Florida unless some phase of the agreement was carried out in Florida. Unless the sales agreement is at least in part a Florida contract it is not subject to taxation under Ch. 201, F.S.

The above mentioned rules apply generally to the promissory notes and new car floor plan agreements also mentioned above; the so-called new car floor plan agreement uses the trust receipt plan (see Ch. 673, F.S.) for the purpose of securing the payment of the promissory note given in that connection. In most instances the taxable document would seem to be the promissory note, unless the floor plan agreement included and agreed to pay obligations in addition to that of the promissory note. Assuming the transaction to be between the finance company and a motor vehicle dealer in Georgia, whether or not it would be subject to taxation in Florida would depend upon whether or not any part or portion of the contract was transacted within Florida.

The two above questions are answered by stating that the documents therein mentioned and described would be subject to taxation in Florida only in case some phase of the same was completed in Florida, under the rules and regulations above set out and discussed.

062-12—January 19, 1962

ELECTORS AND ELECTIONS

CANDIDATES FOR NOMINATION—STATUTORY FEES AND ASSESSMENTS, NATURE OF—§§99.031, 99.061, 99.103, 97.021, 103.121, F. S.; §6, ART. VI, §§20, 26, ART. III, STATE CONST.

To: *Tom Adams, Secretary of State, Tallahassee*
QUESTION:

What is the nature of the filing fees and committee assessments imposed by the Florida statutes against candidates for nomination, as mentioned in §99.031, F. S.?

Organized political parties in this state are classified by statute into majority and minority political parties by §97.021, F. S. majority political parties being those "which on January first preceding a primary election has registered to vote as members more than 5% of the total registered electors of the state," and minority political parties being those which do not have on said January 1 membership of equal to more than said 5%. Political parties qualifying under said section of the statutes as majority political parties "shall nominate its candidates for elective office to be voted for in the next general election, in the primary and in no other manner except to fill vacancies in nomination as otherwise provided." Those seeking nomination as candidates for state and county office, as nominees of majority political parties, are required to pay a filing fee of 3% of the annual salary of the office to which they seek nomination, and a committee assessment equal to not exceeding 2% of said annual salary. (§99.031, F. S.). The committee assessments against candidates for nomination to state and national office are payable to the secretary of state, and those against candidates for county office to the clerk of the circuit court of his county, as are also the filing fees. (§99.061, F. S.).

The executive or managing committees of political parties in this state, referred to as executive committees, are selected at the second primary election in the proper years, by election, those elected becoming the managing group for that political party in the state or county, as the case may be. Under §99.031, the filing fees received by the secretary of state, are paid over to the state committee "for the purpose of meeting its expenses." This seems to include the filing fees paid by candidates for county offices (§99.061, F. S.). Party assessments are also distributed to the proper political committees under §99.103, F. S. These party assessments are imposed pursuant to §103.121, F. S., defining the powers and duties of the said committees as including the power "to make assessment it requires of candidates for the purpose of meeting their expenses and maintaining their party organization No executive committee shall levy assessments to exceed 2% of the annual salary of the office sought by any candidate."

From the above and foregoing it is evident that the statutes of the state mandatorily require that every person offering for nomination to public office in our primary elections must pay, as a condition to becoming such a candidate for nomination the said filing fees and committee assessment. He has no choice but to pay such filing fee and party assessment, else he may not offer for nomination in the primaries. The payments mentioned are mandatory of every candidate offering for nomination in the Florida pri-

maries, and, as to majority political parties, nomination is a condition to having one's name printed on a general election ballot. It has been held by the courts of this state that §6, Art. VI, State Const., applies to party primary elections, as well as general elections (*Bowden v. Carter*, Fla., 65 So. 2d 871, text 873; *State v. Tucker*, 106 Fla. 905, 143 So. 754, where applied to a primary election; *State v. Anderson*, 26 Fla. 240, 8 So. 1 where applied to municipal elections). In *State v. Newell*, Fla., 85 So. 2d 124, text 128, the court held that the requirement in §20, Art. III, that the legislature may not pass special or local laws "for the opening and conducting of elections for state and county officers, and for designating the place of voting," was applicable to primary elections. In *State v. Page*, 125 Fla. 348, 169 So. 854, the court held that §26, Art. III, State Const., relating to elections in general terms, was applicable to and included primary elections. To the same effect see also *Ex Parte Hawthorne*, 116 Fla. 608, 156 So. 619, text 622; *State v. Carson*, 114 Fla. 451, 154 So. 150, text 152. The above authorities seem to hold that Florida's primary election statutes and laws are in law an integral part of the state election machinery, so that the right to vote, even in primary elections, is protected by the 14th amendment of the federal constitution.

From the above and foregoing statutes and authorities it is clear that the filing fee of 3% of the annual salary of the office for which a candidate in a primary election in this state seeks nomination, is not a voluntary donation or contribution, but a statutory imposition to be used for the preparing for and holding primary elections in this state. The committee assessment so called, is of like nature, the difference being that the said filing fee is fixed by the legislature, while the fixing of the committee assessment is fixed by the committee, not to exceed 2% of the office compensation, dependent upon the needs of the party. In either case, a candidate must pay the said fee as a condition to becoming a candidate for nomination; unless such fees be paid he may not become a candidate for nomination. Such sums are mandatory extractions by the statutes, — not a voluntary donation or contribution of the candidate for nomination.

These observations answer the above stated question.

062-13—January 23, 1962

TAXATION

INTANGIBLE PERSONAL PROPERTIES OF CORPORATIONS —CONSTRUCTION OF §199.02, F. S.—EXEMPTIONS UNDER FEDERAL INVESTMENT COMPANY ACT— §199.11, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

What intangible personal properties of corporations registered under the federal investment company act of 1940, as amended, (§§80a-1 to 80a-52, title 15, U. S. code), are exempted by §199.02(8) F. S.?

This subsection provides that nothing contained in §199.02, F. S., shall apply to the assets of a corporation registered under the federal investment company act of 1940 (§§80a-1 - 80a-52, title 15, U. S. code) as amended, or a federally licensed small

business investment company. The said provision originated as Ch. 61-285, the title of which describes it as "an act relating to intangible personal property tax; amending §199.02, F. S., by adding subsection (8); exempting certain corporations engaged in mutual investments; providing an effective date." No mention was made in said title of federally licensed small business investment companies. Although the title of the said act makes mention of "exempting certain corporations engaged in mutual investments," the body of the act seems to attempt to exempt the assets of such a corporation from the intangible personal property taxes imposed by §199.11, F. S., upon the several classes of intangibles mentioned in said §199.02, F. S. In short, no intangible personal property taxes may be imposed, under Ch. 199, F. S., on the assets of investment companies registered under the federal investment company act of 1940, or of federally licensed small business investment companies.

Section 1 of the uniform conveyances act states that the assets "of a debtor means property not exempt from liability for his debts . . ." Bouvier's law dictionary defines "assets" as "all the stock in trade, cash and all available property belonging to a merchant or company." It has also been said to be that property over which a man has dominion and can transfer with or without consideration, and may be reached by execution process (5 C. J. 823; 6 C. J. S. 1031). It may be said to be the property of any person, firm or corporation available for payment of claims and expenses." See also "assets" in Words and Phrases. The capital stock of a corporation is not the same thing as the property or assets of such corporation.

Only the intangible personal properties owned as assets of a corporation registered under the federal investment company act of 1940, and of federally licensed small business investment companies, are exempt under §199.02(8), F. S.; the capital stock issued by the corporation, except such as may be treasury stock, if owned and held by a permanent resident of Florida, is subject to taxation.

062-14—January 23, 1962

DISPOSITION OF UNCLAIMED PROPERTY

CONSTRUCTION OF §30, CH. 61-10, LAWS OF FLORIDA, AS TO CERTAIN REPEALS, §§14.07-14.13, 69.07 AND 69.16, F. S.—§717.03-717.10, 731.33, F. S.; §16, ART. III AND §4, ART. XII, STATE CONST.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Should §30, Ch. 61-10, be construed as repealing §§69.07 and 69.16, F. S., in toto, or merely in so far as said sections are in conflict with said Ch. 61-10, also known as Ch. 717, F. S.?

Said Ch. 61-10, by §30 thereof, (§717.30, F. S.) purports to repeal §§14.07-14.13, 69.07 and 69.16, F. S., whether in conflict or not. No mention of said §§14.07-14.13, 69.07 or 69.16, F. S., is made in the title to said Ch. 61-10, which raises the question of the extent of the repeal, although said §30, Ch. 61-10, purports to repeal said sections without reference to conflicts between said sections and said Ch. 61-10. This factual situation raises the above

stated question. We are, therefore, required to construe said Ch. 61-10, also known as Ch. 717, Florida Statutes, in the light of §16, Art. III, State Const., relating to the subject and titles of acts in the Florida legislature, which section requires that the subject matter of all acts introduced into the Florida legislature "be briefly expressed in the title."

"An act may expressly or impliedly provide for the repeal or modification of an inconsistent statute or statutes on the same subject, although such repeal, amendment or modification is not indicated or referred to in the title, without violating a constitutional requirement that the subject matter of an act be expressed in its title" (82 C.J.S. 370, §219; *Hysler v. State*, 132 Fla. 200, 181 So. 350, text 352). However, where the state legislature desires to repeal a statute, not in conflict with the subject matter of the legislation before it, notice must be given of such an intention to repeal by reference thereto in the title to the legislation in question (30 Fla. Jur. 137 and 138, and 170 and 171, §§48 and 71; 82 C. J. S. 383, §220; 50 Am. Jur. 189, §208; 1 *Sutherland Statutory Constr.*, 3rd Ed., 451-453, §§2004 and 2005; *Crawford Stat. Constr.*, 149 and 150, and 195 and 196, §§104 and 136). In the light of these authorities, there being no mention of §§14.07-14.13, 69.07 and 69.16, F. S., in the title of said Ch. 61-10, said §30, Ch. 61-10, now appearing as §717.30, F. S., should be construed as repealing only the sections mentioned to the extent they are in conflict with said Ch. 61-10, the same being Ch. 717, F. S.

Under §§717.03, 717.04, 717.05, 717.06, 717.07, 717.08, 717.09 and 717.10, F. S. (§§2, 3, 4, 5, 6, 7, 8 and 9, Ch. 61-10), property held by banking and financial organizations, insurers, utilities, business associations and companies, fiduciaries and public officials is not deemed to come within the purview of Ch. 717, F. S. (Ch. 61-10) until unclaimed for a period of 15 years. Not until the expiration of the said 15 years period may its possession be demanded by the state comptroller as the administrator of said Ch. 717. Should we admit that the subject matters of §§14.07-14.13, 69.07 and 69.16, F. S., may also become the subject matter of said Ch. 717, F. S., it is not within the purview of said Ch. 717 until the expiration of the said 15 years period of time. Sections 14.07-14.13, F. S., relate to the recovery from the federal government of certain direct taxes paid the said government by citizens and residents of Florida in violation of the federal constitution. These taxes were paid more than 15 years prior to the effective date of said Ch. 61-10 or chapter 717, F. S. In so far as said Ch. 717, F. S., conflicts with said §§14.07-14.13, F. S., they are deemed to have been repealed by §30, Ch. 61-10.

Section 69.07, F. S., together with §731.33, F. S., was designed to make effective the requirement of §4, Art. XII, State Const., that escheats and forfeitures be and become a part of the state school fund, sometimes referred to as the permanent school fund, as required by said constitutional provision. Under §§69.07 and 731.33, F. S., the escheats become a part of the said school fund upon the closing of the decedent's estate and the transmittal of the escheat funds to the state treasurer. There is no requirement that this fund stand unclaimed for a period of 15 years, as in said Ch. 717, *supra*. The application of said Ch. 717 to escheats would seem to be limited if applicable at all. Any attempt to apply said Ch. 717 to escheats must be carefully applied so as to avoid any

conflict with said §4, Art. XII, State Const., and to conform thereto.

Sections 69.16 and 717.08, F. S., each deal with certain specified properties remaining unclaimed in the hands of fiduciaries. Section 717.08 seems to deal with such properties which have remained unclaimed for a period of 15 years and §69.16 to such unclaimed property but without the 15 years limitation. These sections may be reconciled by applying §69.16, to funds which have been unclaimed for less than 15 years and §717.08, to those remaining unclaimed for more than 15 years. Funds under §69.16 would seem to pass from said section into §717.08 when they have remained unclaimed for more than said 15 years.

From the above and foregoing §30, Ch. 61-10, also known as §717.30, F. S., should be construed as repealing §§69.07 and 69.16, F. S., only in so far as they are in conflict; there are no total repeals of said §§69.07 and 69.16.

062-15—January 24, 1962

RETIREMENT

STATE AND COUNTY OFFICERS AND EMPLOYEES—SOUTH-
WEST FLORIDA WATER MANAGEMENT DISTRICT—CH.

61-691, CH. 25270, 1949, LAWS OF FLORIDA; CHS.

378 and 122, F.S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are the officers and employees of the southwest Florida water management district, within the purview of Ch. 122, F. S., relating to state and county officers and employment retirement?

This water management district was created and established by Ch. 61-691 for the purposes defined and provided for in Ch. 378, F.S., relating to flood control, reclamation, conservation and allied purposes, and for state cooperation with the U. S. in the manner provided by congress for flood control, reclamation, conservation and allied purposes in protecting the inhabitants, the land and other property within the district from the effect of a surplus or a deficiency of water within the area embraced by the said district.

Said Ch. 61-691, like Ch. 25270, 1949, creating and establishing the central and southern flood control district, was designed to operate and function under said Ch. 378, F.S., and for a like and similar purpose. The civil defense agency (060-67; 1959-1960 AGO 541), the Jacksonville expressway authority (055-326; 1955-1956 AGO 425), the cross state canal authority (052-165; 1951-1952 AGO 2180), and the Florida Keys aqueduct commission (049-430; 1949-1950 AGO 168) have been held by this office to have been within the state and county retirement acts of this state.

We are, therefore, of the opinion that the southwest Florida water management district, like the central and southern flood control district, is a public agency within the Florida state and county officers and employees retirement system, so that its officers and employees are within the purview of said retirement system.

062-16—January 26, 1962

CRIMINAL PROCEDURE

COSTS AND FEES—COUNTY FINANCIAL RESPONSIBILITY
IN EVENT OF CHANGE OF VENUE, §142.16, F. S.—CH.
30, F. S.*To: Frederick H. Hope, Attorney at Law, Palm Beach*

QUESTIONS:

1. When in the course of a prosecution for murder, which is pending in Palm Beach county courts, a motion by the defense for a change of venue is granted and the case is removed for trial to another county, who is financially responsible for the costs of the trial in the other county, the Palm Beach county commission or the Palm Beach county sheriff's office?

2. Should the expenses incurred in the other county be charged directly to the county commission or directly to the sheriff's office?

3. If the expenses are to be charged directly to the sheriff's office and there is no appropriation for same in the sheriff's budget, nor funds available for the payment thereof, should Ch. 30, F. S., §30.49(8), be utilized?

4. If said expenses are primarily the responsibility of the sheriff's office and are to be charged to his budget and no funds are available and the county commission advises that no emergency increase will be granted until additional tax revenues are forthcoming to the county, may the sheriff's department avail itself of Ch. 30, F. S., §30.49(3), pertaining to appeals?

5. If upon a second trial, for a different murder, the defendant is brought to trial in still a third county and the defendant is in the state penitentiary at Raiford at that time, would the financial responsibility and procedure be consistent with the answers to questions 1 through 4?

AS TO QUESTION 1:

This question is answered by §142.16, F.S., reading as follows:

142.16 *Change of venue.*—In case of change of venue in any case, all fines and forfeitures in such case go to the county in which the indictment was found, and the fees of all officers and witnesses are a charge upon the county in which the indictment was found, in like manner as if the trial had not been removed. All costs and fees arising from the coroner's inquests shall be a charge upon the county where the inquest is held, and shall be payable from the general revenue fund of the county.

When there is a change of venue, this statute makes the fees of all officers and witnesses a charge upon the county in which the indictment was found, and in like manner as if the trial had not been removed. Therefore, since the indictment was returned in Palm Beach county, the fees of officers and witnesses earned in connection with the case in another county to which the venue has been changed are a charge against Palm Beach county, and it is

the responsibility of the board of county commissioners of the latter county to pay the same in like manner as if such fees had been earned in the latter county. The result is that the sheriff of Palm Beach county is under no legal obligation to pay any such fees.

AS TO QUESTION 2:

In the light of my answer to question 1, the bills for fees earned by officers and witnesses in another county after a change of venue to that county from Palm beach county, where the indictment was found, should be presented to the board of county commissioners of the latter county, rather than the sheriff.

AS TO QUESTIONS 3 and 4:

In the light of the foregoing comments, it does not appear to be necessary to answer these questions.

AS TO QUESTION 5:

I assume that this question has reference to another case in which the indictment was returned in Palm Beach county and the venue was changed to a second county and subsequently changed to a third county. In such a situation, it is my opinion that the above-quoted statute contemplates that the fees earned by officers and witnesses in both the second and third counties in connection with said case are a charge on Palm Beach county and that the bills therefor should be presented to and paid by the board of county commissioners of that county.

062-17—January 26, 1962

COUNTY OFFICERS AND EMPLOYEES

COMPENSATION, COUNTY JUDGES PINELLAS COUNTY—
CHS. 61-461 (CH. 145, F. S.) 61-655 and 59-894, LAWS OF
FLORIDA

To: *Ray E. Ulmer, County Judge, Clearwater*

QUESTION:

What effect do the provisions of Ch. 61-461 have on the compensation provided for certain county officials by special acts, where the application of such special acts for the calendar year 1961 results in actually giving such county officials an annual salary in an amount less than that provided for in Ch. 61-461?

Chapter 61-461, enacted during the 1961 legislative session, is intended to "provide for the compensation of the several county officers by this law of general and uniform operation." (See §145.011 (1), F.S.) Section 3 of said Ch. 61-461 provides as follows:

Section 3. This chapter shall not be construed to repeal, affect or modify any local or special law, or general law of local application enacted prior to or during 1961 as to compensation of county officers, travel expenses of county officers, or payment of extra compensation to the chairman of any board of county commissioners or board of public instruction; *provided, however, if any county officer's compensation prescribed herein is more than that provided in any local or special law, or general law of local application, this law shall control and be applicable.* The provisions of this act shall not apply where in conflict with local laws applicable to Gadsden

county, Liberty, Franklin and Wakulla counties passed at the 1961 or prior sessions of the legislature. (Emphasis supplied.)

The annual compensation for county judges, as provided in Ch. 61-461, is \$16,000 (§145.061, F.S.).

Chapter 61-655, a population act relating to the compensation of county judges in Pinellas county, provides that county judges in said county shall receive "all of the net income from such office not to exceed \$16,000 per annum, payable in equal monthly installments." Chapter 61-655 became effective on June 22, 1961 (See §10, Ch. 61-655). Salary formerly provided for county judges in Pinellas county was \$14,500 per annum as previously fixed by Ch. 59-894.

As a result of the foregoing special acts, the county judge in Pinellas county receives \$14,500 from Jan. 1, 1961 until June 22, 1961, at which time his annual salary for the remainder of the year would be computed on the basis of \$16,000 per annum. (See AGO 059-166 and 058-57; see also *State ex rel Bayless v. Lee*, 156 Fla. 494, 23 So. 2d 575.) It is apparent that the annual salary for the county judge for the calendar year 1961 will amount to less than \$16,000 per annum as a result of such pro rata computation. However, it is further apparent that for the calendar year 1962 and subsequent thereto, the salary for county judges would be based solely on the \$16,000 figure provided in Ch. 61-655.

The foregoing circumstances give rise to the question of whether the salary provided for county judges in Ch. 61-461 and payable for the entire year of 1961 will supersede the salary provided by Ch. 61-655 computed together with the salary provided by Ch. 59-894. (See AGO 061-159.)

It is my opinion that Ch. 61-461 is not intended to repeal Ch. 61-655 or any special act of this type where the salaries provided in both the general and special acts are equal, but the resulting effect is that the salary provided by the special act is actually less than that contained in Ch. 61-461. This conclusion is based upon the apparent wording of §3, Ch. 61-461 which limits the superseding effect of said chapter to those instances where the compensation prescribed in said chapter "is more than that provided in any local or special law, or general law of local application." Chapter 61-655 specifically fixes the annual compensation of the county judge in an amount that is *equal* to that fixed by Ch. 61-461. Stated differently, the compensation for the county judge under Ch. 61-461 is *not* greater than the amount *provided* in Ch. 61-655. Although, for the calendar year 1961, the county judge will actually receive less than the figure stated in Ch. 61-461, the controlling factor is the figure actually *provided* in the local act.

In light of the above statements and in keeping with the specific language contained in Ch. 61-461, it is my opinion that the compensation for county judges, as fixed by Ch. 61-461, will not supersede or modify the compensation fixed for county judges of Pinellas county pursuant to Ch. 59-894 and 61-655. Hence, the county judges' compensation for the calendar year 1961 will be computed based upon the compensation provided in the foregoing local acts. For a more detailed discussion of the possible utilization of Ch. 61-461, your attention is invited to AGO 061-151.

062-18—January 26, 1962

SHERIFFS

UNIFORMS OF DEPUTIES AS EXPENSE OF OFFICE— MANNER OF PAYMENT—RECORDS—CHS. 30, 274, §274.01(1), F. S.

To: *Bryan Willis, State Auditor, Tallahassee*

QUESTIONS:

1. May a sheriff pay direct to the vendor or pay a flat allowance to his deputies from the office operating funds for the purchase of uniforms for the deputies?

2. May a sheriff pay direct to the vendor or pay a flat allowance to his deputies from the office operating funds for the purchase of plain clothes (not uniforms) for the deputies?

3. If the answer to either of the above questions is in the affirmative, should the uniforms or the plain clothes be recorded in the sheriff's record of tangible personal property in accordance with Ch. 274, F. S.?

AS TO QUESTION 1:

Although Ch. 30, F.S., contains no express provision authorizing the purchase of the uniforms for deputy sheriffs, it has, as a matter of custom of long standing, become recognized that law enforcement officers such as deputy sheriffs be clothed in uniforms identifying them as law enforcement officers.

Because of such custom, I am of the opinion that the purchase of uniforms for the sheriff's deputies would be an authorized expenditure of the sheriff's office, provided funds are properly budgeted for such expenditure.

Further, it appears that payment for such uniforms could be made by the sheriff either directly to the vendor or on a reimbursement basis to the deputies as uniforms are purchased.

Question 1 is answered accordingly.

AS TO QUESTION 2:

I am unable to find any authority, custom or otherwise, which would permit a sheriff to provide ordinary street clothing or to pay a flat allowance for such clothing to his deputies who are not required to wear a deputy sheriff's uniform.

Question 2 is, therefore, answered in the negative.

AS TO QUESTION 3:

Chapter 274, F. S., the county tangible personal property control law, requires the keeping of certain records in connection with tangible personal property owned by a governmental unit. Section 274.01 (1), as amended by Ch. 61-102, defines the sheriff of the county as a governmental unit. It is my opinion that where funds of the sheriff's office are used in connection with the purchase of uniforms for deputy sheriffs either when purchased by the sheriff or when reimbursement for the purchase of such uniforms is made to the deputy sheriffs, such expenditures should be deemed an expenditure of the sheriff's office and that the provisions of Ch. 274 should be complied with.

Question 3 is answered in the affirmative.

062-19—January 26, 1962

INSURANCE

DUTIES OF FLORIDA INSURANCE COMMISSIONER IN
 CONNECTION WITH APPOINTMENT OF ANCILLARY
 RECEIVER OF MICHIGAN SURETY CO. FORMERLY
 AUTHORIZED TO DO BUSINESS IN FLORIDA
 AND WHOSE BUSINESS IS BEING LIQUIDATED
 IN DOMICILIARY STATE—§§-
 631.091, 631.051-631.071 AND
 631.152, F. S.

To: J. Edwin Larson, State Treasurer and Insurance Commissioner, Tallahassee

QUESTION:

What are my responsibilities and duties as insurance commissioner of the state in connection with the appointment of an ancillary receiver of Michigan Surety Co.?

I am advised by the Oct. 26, 1961 letter of the Honorable Frank Blackford, commissioner of insurance of Michigan, addressed to you as insurance commissioner of Florida, that a temporary conservatorship of Michigan Surety Co.'s affairs has been established in its domiciliary state of Michigan.

It is my further understanding that Michigan Surety Co., although at one time authorized to conduct an insurance business in Florida, has not conducted such business because of the revocation of a certificate of authority by the Florida insurance department on October 30, 1959. You, as insurance commissioner of the state, may apply to the Florida courts for an order appointing you as ancillary receiver of a foreign insurer upon any of the grounds specified in §631.051 or §631.061 or upon the ground that its property has been sequestered in its domiciliary sovereignty or in any other sovereignty (§631.071, F.S.).

In addition, you, as insurance commissioner, may apply to the court for an order appointing you as ancillary receiver and directing you to liquidate the business of a foreign insurer having assets, business or claims in this state upon the appointment in the domiciliary state for such insurer of a receiver, liquidator, conservator, rehabilitator or other officer by whatever name called for the purpose of liquidating the business of such insurer (§631.091, F.S.).

You, as insurance commissioner, are required to file a petition requesting the appointment of an ancillary receiver on the grounds set forth in §631.091, viz., where there has been an order of liquidation entered in the domiciliary state, provided you determine that there are sufficient assets of such insurer located in this state to justify the appointment of an ancillary receiver, or if a petition of 10 or more persons resident in this state having claims against such insurer are filed with you requesting the appointment of an ancillary receiver (§631.152).

Section 631.152(2) provides that the domiciliary receiver, for the purpose of liquidating an insurer domiciled in a reciprocal state, shall be vested by operation of law with title to all the property, contracts, rights of action, all the books and records of the insurer located in this state and confers upon the domiciliary receiver

in a reciprocal state immediate right to recover balances due from local agents and obtain possession of any books and records of the insurer found in this state. The domiciliary receiver is also entitled to recover any other assets of the insurer located in this state except that upon the appointment of an ancillary receiver in this state, the ancillary receiver shall, during the ancillary receivership proceedings, have the sole right to recover such other assets. Section 631.152 (3) further confers upon the domiciliary receiver of an insurer domiciled in a reciprocal state the authority to sue in this state and recover any assets of such insurer to which he may be entitled under the laws of this state.

Section 631.152 is a part of the uniform liquidation of insurers act and I gather from the letter of the Honorable Frank Blackford, commissioner of insurance of Michigan, that Michigan is a reciprocal state under such act. In view of the above sections of Ch. 631 of the Florida insurance code, you, as insurance commissioner of Florida, may, if you deem it advisable upon the facts known to you, apply to the Florida courts for the appointment of an ancillary receiver of Michigan Surety Co. Such determination is one to be based upon the exercise of your sound discretion unless, as set forth in §631.152, you find that there are sufficient assets of said insurer located in this state to justify the appointment of an ancillary receiver, or, if you are presented a petition by 10 or more persons, residents of this state having claims against said insurer, requesting the appointment of an ancillary receiver.

062-20—January 29, 1962

COUNTY PUBLIC MONEYS

COUNTY DEPOSITORIES—BOND CONTRACT DESIGNATING
NONRESIDENT BANK IN VIOLATION OF §§136.01 AND
237.32, F. S.—CH. 59-1324, LAWS OF FLORIDA; §75.09,
CH. 75, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

What effect, if any, does a bond validation decree have upon a provision in a bond resolution and proceedings establishing a depository for the sinking fund in another state in violation of §§136.01 and 237.32, F. S.?

Chapter 136, F.S., requires the establishment of depositories of county funds, §136.01 thereof providing that "any bank, national or state, authorized to do business in this state which will, as to the various funds hereinafter referred to, offer satisfactory inducement as to security as herein provided is hereby created and designated a county depository for the funds for which such security shall be furnished and may receive such public funds in the manner and method hereinafter provided. The funds hereinabove referred to shall include: . . . funds of the county board of public instruction, . . . it being the intention hereof that all funds . . . of the board of public instruction in such county, shall be included." This section was amended by Ch. 59-23, as was §237.32, F.S., which provides that persons having or receiving, or collecting any money payable to the several school funds of the county or of the district shall

pay the same to the bank or banks qualified, pursuant to law as a county depository and designated for that purpose by the county board of public instruction"

The board of public instruction for Hardee county, by its resolution of March 21, 1960, under and pursuant to Ch. 59-1324, provided for the issuance, sale and delivery of negotiable bonds in the amount of \$250,000 to be used for the purpose of acquiring specified school buildings and facilities. This act provided for the allocation of \$25,000 annually, from the school board's portion of the race track funds, to the payment of these bonds. Such allocated sums are required by the act to be "deposited by the board of public instruction in a special fund to be known as the school building fund" This act contains no authority for establishing such fund other than pursuant to §§136.01 and 237.32, F.S.

The school board's resolution of March 21, 1960, provided that the revenue fund, sinking fund, reserve account and the redemption fund, established and created by said resolution, "shall constitute trust funds for the purposes provided for herein, and shall be maintained at the Sears Bank & Trust Co., Chicago, Illinois. All of such funds, including the revenue fund, shall be continuously secured in the same manner as state and municipal deposits are required to be secured by the laws of Florida. Moneys in the reserve account and the redemption fund may be invested in direct obligations of the U. S. Any and all income and interest received upon any investments of moneys in the reserve account and redemption fund shall be deposited by the board in the sinking fund." This portion of the said resolution is clearly conflicting with and violative of §§136.01 and 237.32, F.S.

The circuit court, in its validation decree of April 19, 1960, as amended June 3, 1960, finds and holds that the "proceedings preliminary to the issuance thereof (the bonds) are of the nature as entitled the petitioner herein to proceed under the provisions of Ch. 75, F. S., for the purpose of having the right of said board to issue said bonds determined." The process issued in the case was next approved and held sufficient to give the court jurisdiction. The said decree further found that "all requirements of the constitution and laws of Florida, pertaining to the enabling act, and proceedings in the above entitled matter have been strictly followed." The bonds were validated and confirmed by the above validating decree as amended.

Under §75.09 F. S., decrees of the circuit courts validating bond issues by counties, municipalities, taxing districts, etc., the "decree shall be forever conclusive as to the matters adjudicated against the petitioner and all parties affected thereby, including property owners, taxpayers and citizens of the petitioner, and all others having or claiming any right, title or interest in the property to be affected by the issuance of said bonds, certificates or other obligations, or to be affected in any way thereby, and the validity of said bonds, certificates or other obligations, or the taxes, assessments, or revenue pledged for the payment thereof or of the proceedings authorizing the issuance of such obligations, including the remedies provided for their collection, shall never be called into question in any court or by any person or party, either as plaintiff or defendant." Such a validating decree precludes a subsequent attack on the validity of the bonds by reasons of failure

to follow statutory requirements and directions, where there is no question of jurisdiction under the validating proceedings; and the asserting of constitutional rights and privileges that are subject to waiver, although constitutional rights and privileges not subject to waiver are not set at rest by the validating decree (26 Fla. Jur. 479-482, §§146-148). The purpose of such a decree is to determine the authority of the governmental agency to incur the bonded indebtedness, to insure that any defenses that may be raised to collect on the obligations are set at rest in the beginning; and to obtain an adjudication as to the regularity of the steps taken issuing the bonds; to investigate the validity of the proposed bonds before they issue. Such decrees are in the nature of declaratory ones.

The statutes under which bonds are issued become a part of the bond contract (6 Fla. Jur. 502, §279), as well as the agreements concerning the payment of the bonds. The resolution of the school board concerning the issuance of the bonds also entered into and became a part of the bond contract.

In that the above mentioned resolution of March 21, 1960, setting up the above mentioned funds provides that they "shall be continuously secured in the same manner as state and municipal deposits are required to be secured by the laws of Florida," the securities required should be those provided by law for the securing of state and municipal deposits, which must have the approval of those approving such securities to secure such deposits. Until these requirements are met and conformed to no deposits may legally be made in the nonresident banking institution mentioned, or any other nonresident bank.

Although we must hold that the provision in the school board's resolution of March 21, 1960, providing for the maintenance of specified funds in the Sears Bank & Trust Co., Chicago, Illinois, was in violation of the statutes of Florida (§§136.01 and 237.32, F. S.), such provision, being a part of the school board's resolution for the issuance of such bonds, appears to have become a part of the bond contract, when approved by the validating decree, and should be conformed to. No proceeding which may be violative of a Florida statute should be validated by the courts of this state in a validation proceeding under Ch. 75, F. S., even though the provision may become final under a validation proceeding under Ch. 75, F. S. Those handling such a case have the duty to conform to law, even though their errors may become perpetual under a validating decree.

062-21—January 29, 1962

STATE DEPARTMENT OF PUBLIC WELFARE

CH. 409, F. S. AND CH. 21013, LAWS OF FLORIDA, 1941—
CONFLICTING ORDINANCES OF DADE COUNTY—§§
409.04, 409.05, F. S.—§11, ART. VIII (5), (7) AND (9),
STATE CONST.

To: *Frank M. Craft, State Director, Department of Public Welfare, Jacksonville*

QUESTION:

Can the board of county commissioners of Dade county, under the Dade county home rule amendment

pass an ordinance regulating and licensing child care facilities which would supersede or repeal specific sections of Ch. 409, F. S., or Ch. 21013, 1941, which places the jurisdiction of those facilities under the Florida state department of public welfare?

Chapter 409, F. S., creates the state department of public welfare and places the protection, care and guidance of children with improper guardianship, including abandoned and neglected children, destitute children, mentally defective or physically handicapped children and morally defective children, under the said department. Sections 409.04 and 409.05, F. S., which provides institutional care for such children, provides among other things that no institution, society or association may receive a dependent child for boarding or custody unless such person, society, association or institution shall have first procured a license from the department of public welfare (see State Dept. of Public Welfare v. The Gallilean Children's Home, 102 So. 2d 388).

As for the interpretation and application of Ch. 21013, 1941, see AGO 1947-48, p. 438.

Section 11, Art. VIII, State Const. provides for the Dade county home rule amendment. In §11 (5), Art. VIII, it is provided, among other things, that nothing in this section shall limit or restrict the power of the legislature to enact general laws which relate to Dade county, and the home rule charter provided for herein shall not conflict with any provisions of this constitution nor with any applicable general laws now applying to Dade county or any other one or more counties of the state, nor shall any ordinance enacted pursuant to said home rule charter conflict with this constitution or any such applicable general laws, except as expressly authorized herein.

Section 11(7), Art. VIII, State Const., provides that nothing shall be construed to limit or restrict the power of any state agency, bureau or commission now or hereafter provided for in this constitution or by general law, and the said state agencies, bureaus and commissions shall have the same power in Dade county as shall be conferred upon them in regards to other counties.

Section 11(9), Art. VIII provides substantially, among other things, that it is declared to be the intent of the legislature and all the electors of the state to *provide home rule for the people of Dade county in local affairs*, and it is further declared to be the intent of the legislature and of the electors of the state that the provisions of this constitution and general laws which shall relate to Dade county and any one or more counties of the state or to any municipality in Dade county shall be the supreme law in Dade county.

Your question is answered in the negative.

062-22—January 29, 1962

TAXATION

HOMESTEAD TAX EXEMPTION—TAX STATUS OF APARTMENTS IN WHISPERING WATERS COOPERATIVE APARTMENTS, ORANGE COUNTY—§7, ART. X, STATE CONST.—§§192.01, 192.02, 193.12, 193.20, 193.21, 194.13 AND 194.45, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Where cooperative apartments are held by their owners who hold undivided interests in the apartment building, the lands upon which it is located, and other properties held in connection with the said building, with the exclusive right to occupy a duly identified apartment to the exclusion of all other persons, how should such owners' homestead tax exemption rights be determined?

This question concerns apartment owners and occupants in the Whispering Waters Coop. apartments, in or near Winter Park, Orange county. There are involved apartments in eight three-story apartment buildings and two garages evidently underground, for use of the apartment owners. The buildings are identified by a building number, and the apartments in each such building by apartment numbers; six of such apartment buildings having six apartments each, one having 12 apartments, and one having 19 apartments. Such apartments sometimes vary in size with the same apartment building. A master deed form for the apartments was filed and recorded Feb. 25, 1960, in the public records of Orange county. A deed of conveyance, on the master form recorded as aforesaid, was made, executed and delivered, from the apartment builders to an occupant on July 5, 1961, and recorded in the public records of Orange county, on July 6, 1961.

By this deed of conveyance the apartment builders purport to convey to an apartment purchaser "an undivided 1.750 % interest in ... the south 190 feet of lot 1, Phillips Circle Replat," as recorded in Orange county public records; from this description is "exempted the buildings and improvements located thereon." We are not advised whether or not the percentage here mentioned is the same in each conveyance; however, we presume that the percentages probably vary depending upon the size of the apartments. This deed of conveyance also purports to convey to the grantee therein a specified apartment in an identified apartment building, together with the terraces or balconies which are a part of said apartment ... together with an undivided one-sixth interest (the apartment described being one of six in the apartment building described) in and to the walls and other structural supports in said building, the use of a specified space in an identified common garage, the right of ingress and egress to and from the described apartment and apartment building, and certain specified rights common to all the apartment owners. The title to the property conveyed by the said warranty deed is fully warranted by the grantor. The conveyance contains a limitation limiting the use of the apartment to residential use only. The apartment may be sold by the grantee only upon the approval thereof by the "board of governors" mentioned therein.

The above mentioned "master form of warranty deed," the conveyance specifically mentioned and discussed above, and other documents made available to us, tend to indicate apartment ownership like or similar in nature to "condominiums" discussed in our opinion of Dec. 11, 1961 (061-190) to the director of the federal housing administration. These documents were evidently designed for and intended to convey to the apartment purchaser something in the nature of a "condominium" title to the apartment in question. Under said conveyance a "condominium" or similar title appears to have vested in the apartment purchaser. This title being in the nature of a legal title to real property is within the purview of §7, Art. X, State Const., and will entitle the owner of the apartment to homestead tax exemption rights, provided he or she resides thereon and in good faith makes the same his or her permanent home, or the permanent home of another or others legally or naturally dependent upon such owner, provided such owner be a resident of Florida (see AGO 057-90, of April 8, 1947; 1947-1948 AGO 94). Having reached the question of the right of the owner of an apartment in an apartment building to homestead tax exemption, and, for the purposes of the apartments in question, found their owners to be entitled to homestead tax exemption, when other provisions of the constitution and statutes are complied with, subject, however, to the limitation that "no such exemption of more than five thousand dollars shall be allowed to any one person or to any one dwelling house, nor shall the amount of the exemption allowed any person exceed the proportionate assessed valuation based on the interest owned by such person. We shall consider these two questions in order last above mentioned.

The constitutional limitation that "no exemption of more than five thousand dollars shall be allowed to ..." any one dwelling house was before the supreme court of Florida in *Overstreet v. Tubin*, Fla., 53 So. 2d 913, in which it was held that the entire apartment building, and not an apartment therein, was a dwelling house within the purview of §7, Art. X, State Const. In this case the apartment building in question was a duplex, each apartment being separately owned and occupied. The court held that the entire structure constituted a *dwelling house* within the purview of said §7, Art. X, State Const., and the \$5,000 homestead tax exemption was limited to the apartment building and not to each apartment in the building. The court held that the two homesteaders residing in the apartment building would divide the said \$5,000 exemption, each receiving an exemption of \$2,500, not an exemption of \$5,000. This opinion was followed by the district court of appeal, 3rd Dist., in *Gautier v. Safra*, Fla. App., 127 So. 2d 683, in which the court considered an apartment building with four or more apartments. Each of the owners of four of said apartments, made his permanent home in the apartment owned by him, and claimed homestead tax exemption of \$5,000 on his individual apartment. The court held that the \$5,000 exemption was to be divided between the homestead owners in the building, held that each of the four homesteaders could be granted an exemption of only \$1,250 each. This rule must be applied to the apartments here in question, building by building.

The apartment buildings have six apartments; should there be six homesteaders therein, each claiming an exemption, each homesteader would be limited to one-sixth of the \$5,000 exemption,

or about \$833.33. Under like circumstances, a 12-unit apartment building would be limited to about \$416 for each apartment owner. The exemption for a 20-unit apartment building, under like circumstances, would be \$250 for each apartment owner. We have not here considered instances where one or more of the occupants are not qualified to claim homestead tax exemption.

We come next to the consideration of the constitutional limitation that a homesteader's right to exemption may not "exceed the proportionate assessed valuation based on the interest owned by such person." The warranty deed above mentioned purports to vest in one of the apartment owners "an undivided 1.750 per cent interest" in "the south 190 feet of lot 1, Phillips Circle Replat," as recorded in the public records of Orange county, "excepting the buildings and improvements located thereon." The said conveyance purports to convey to the grantee a specified apartment, one of six in the specified apartment building, together with the terraces or balconies which are a part of the said apartment, etc. For all intents and purposes the owner and occupant of an apartment may be considered its owner, such interest to be based on its full cash value, together with an undivided one-sixth (or other stated interest) in the apartment building, its foundations, etc., such interests also to be based on its full cash value.

"For the purpose of taxation 'real property' shall be construed to include lands and all buildings, fixtures and other improvements thereon," (§192.02, F. S.). In *Yowell v. Rogers*, 128 Fla. 881, 175 So. 772, text 773, the court said that "improvements such as a dwelling becomes a part of the freehold, and under our system of taxation must be assessed with and as a part of the real property." "Except where changed or modified by statute, as a general rule buildings or other improvements constructed on the lands of another become a part of the freehold for purposes of taxation." In an apartment building above described having six apartments each apartment owner, like or similar to a tenant in common, owns an undivided interest in certain mentioned things, an undivided 1.750 per cent (or other specified interest) in the south 190 feet of lot 1, Phillips Circle Replat, etc., an undivided one-sixth (or other specified interest) in the terraces and balconies of his apartment, and other properties and rights described in his deed of conveyance. In other words each apartment owner is seized and possessed of the title and use of his apartment and its facilities, etc., with other interests in the lands, etc., the same constituting property and property rights, within the taxing laws of the state.

Under §192.01, F. S., all real and personal property in this state is subject to taxation, unless expressly exempted. The term "real property" as used above includes not only the land but also the buildings, fixtures and other improvements thereon (§192.02, F. S.). Under §193.12, F. S., persons owning or having the control, management, custody, direction, supervision or agency of property of whatever character subject to taxation in this state "shall return the same for taxation to the county assessor of taxes in the proper county." Under §193.20, F. S., the tax assessor may "assess in one assessment all the lands in a section belonging to the same owner" Under §193.21, F. S., lands not returned for assessment by its owner may be assessed in the name of its last known owner. Under §194.13, F. S., any portion of land, or interest therein, in a state tax sale certificate, was subject to redemption. Likewise,

under \$194.45, county tax sale certificates may be redeemed in whole or in part.

We reach the view that an apartment in "condominium" together with the undivided interests of its owner (hereinabove mentioned and discussed) are subject to taxation in the name of the owner as an interest separate from other owners. Statutes above referred to seem to contemplate assessments in the name of the owner of taxable property and its assessment in such manner as to permit the payment of the taxes by the property owner, with as little trouble to him as is reasonably possible. We, therefore, hold that the separate property rights of apartment owners in a "condominium," including his apartment, may be assessed to and in the name of such owner.

Every apartment in the apartment buildings will be subject to taxation in the name of its owner, whether the builder thereof or subsequent owner, and whether occupied or unoccupied. The tax liens encumber the apartments and the undivided interests allocable thereto by whomever owned. Vacant apartments should be assessed for taxes in the name of their owner, whether resident or nonresident. Apartment owners may be granted homestead tax exemption only when they meet the requirements of §7, Art. X, State Const., including the requirements that such owners "reside thereon and in good faith makes the same his or her permanent home," etc.

There appears in the so-called "master form of warranty deed" provisions against the sale and transfer of their interest in their apartment and in common property unless the same be approved by a board referred to as board of governors, we entertain doubt that such a provision will be permitted to defeat the county's right to collect taxes levied and assessed as aforesaid, through the sale of the property through tax deed, if the tax certificate be acquired by persons other than the county, or by county foreclosure, in case the county acquires the tax certificate.

These observations seem to answer the above question as well as the same may be generally answered.

062-23—January 29, 1962

CRIMINAL PROCEDURE

FINE AND COST BOND SUBJECT TO STATUTE OF LIMITATIONS—§§921.15, 95.11 (1), 95.021, 55.15, F. S.

To: *Stanley C. Burnside, Clerk of the Circuit Court, Dade City*
QUESTION:

Is a fine and cost bond, in default and past due, which is of record in the judgment records of the county and over 20 years old, subject to the statute of limitations?

Section 921.15, F. S., authorizes the taking of a fine and cost bond. The case of *Williams v. State*, 25 Fla. 734, 6 So. 831, requires such bond to be under seal. It is therefore assumed for purposes of this opinion that the bond is under seal.

Section 95.11 (1), F. S., requires that actions on instruments under seal be brought within 20 years.

A statute of limitations is not applicable to the state or its agencies unless the terms of such statute specifically provide that the statute is so applicable. Therefore §95.11 (1), *supra*, would not prevent the state or its agencies from bringing an action on

the bonds were it not for §95.021, F. S., which specifically makes said 20-year statute of limitations applicable to the state and its agencies. Since the limitation period is applicable to the state and its agencies through the operation of §95.021, *supra*, I think that §95.11 (1), *supra*, is a bar to any action at law to recover on the bond.

It is true that §921.15 (2), F. S., contains the following provisions:

(2) The bond shall be made payable in 90 days from the date thereof to the governor of this state and his successors in office, and if not paid at the expiration of the 90 days, the sheriff or other officer aforesaid shall indorse on the bond that default has been made in the payment, and having signed such indorsement, shall file the bond with the clerk of the court in which judgment was rendered, and the clerk shall forthwith issue execution for the amount of the fine and costs against the security or bail, as if there had been judgment at law on such bond, and the same proceedings shall be had as in cases of other executions, and the person convicted shall be liable to be proceeded against, as if no such bond had been given, until the same has been fully paid and satisfied.

Assuming that the fine and cost bond in question, bearing the required endorsement, was filed after default in payment, it could be argued that §95.11 (1), *supra*, which also fixes a 20-year period of limitation for an action on a judgment, does not bar the issuance of an execution on such bond even though it has been in default for 20 years, because issued under the terms of said statute, an execution is not based on an actual judgment, but, rather, is based on the bond itself and the endorsement of the sheriff or other officer that there has been a default in payment. However, I do not think that the courts would agree with such an argument. The above-quoted portion of §921.15 (2), *supra*, provides that when the prerequisite steps thereby required have been taken, the clerk shall forthwith issue an execution against the sureties "*as if there had been judgment at law on such bond,*" and it is my opinion that (at least for the purpose of issuing an execution) the filing of the bond bearing the required endorsement showing default in payment is a substitute for and amounts to a judgment, and that after the lapse of 20 years, §95.11 (1), *supra*, bars the issuance of the execution provided for by §921.15 (2), *supra*, just as the lapse of 20 years after the entry of an ordinary judgment bars the issuance of an execution upon such judgment. (See §55.15, F. S. and *Viggio v. Wood*, 101 So. 2d 922.)

If the sheriff or other officer failed to comply with said statutory requirement by making an endorsement of default in payment on the bond and filing it, and if 20 years have elapsed since default in payment of the bond, I do not think that the proper clerk could now issue the execution provided for by §921.15 (2), *supra*, even if the bond were now filed with him, bearing the required endorsement. Since it is my opinion that no execution could now be issued upon the basis of the filing of the bond, bearing the required endorsement, over 20 years ago, it seems to me illogical to say that the sheriff or other officer can prevent the running of the 20-

year period of limitation by neglecting his duty to make the required endorsement on the bond and file it with the clerk.

In conclusion, it is my opinion that after the passage of 20 years from the date a fine and cost bond became payable, it is too late to either sue on the bond or procure the issuance of an execution under §921.15 (2), supra, and that your question is properly answered in the affirmative.

062-24—January 30, 1962

INSURANCE

ALIEN INSURER DOING BUSINESS IN FLORIDA—§§624.06-
(4), 624.0210 (3), F. S.

To: *J. Edwin Larson, State Treasurer and Insurance Commissioner, Tallahassee*

QUESTION:

Is an alien insurer, authorized to do business in Florida, required to deposit securities under the provisions of §624.0210(3), F. S.?

Section 624.06 (4), F.S., provides that except where distinguished by context, the term "foreign" insurers also includes "alien" insurers.

Section 624.0210 (3), F.S., requiring deposits for the protection of such insured's policyholders or policyholders and creditors or citizens and residents of this state or persons who hold policies issued upon property in this state, contains no exemption as to alien insurers.

It is therefore my opinion that an alien insurer authorized to do business in Florida is required to deposit securities under the provisions of §624.0210 (3), F. S., for the benefit of Florida policyholders and creditors of such insurer.

062-25—February 2, 1962

CORPORATIONS

FOREIGN CORPORATIONS—TRANSFERS OF STOCK IN
OTHER STATES—TRANSFER RECORD—§§201.04, 201.05,
608.39, 614.03, 614.07, 614.09, 614.10, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where stock of a foreign corporation is transferred in a state other than that of its domicile and a record of such transfer is entered on the transfer records of such corporation located in this state, is such a transfer of stock subject to documentary stamp taxes in this state?

It has long been the custom of corporations of this and other states to maintain stock transfer records in states other than that of their domicile. Many Florida corporations keep stock transfer records in New York, Illinois, and other states to accommodate transfers made in such states, as well as in other states. We are not here concerned with the original issue of shares of stock (§201.05, F. S.) but with the transfer of issued and outstanding shares of stock made in a state other than that of the domicile

of the corporation, but which transfer is evidenced by entries on transfer records maintained in this state.

The uniform stock transfer act has been adopted by all or substantially all of the states of the U. S., and the district of Columbia, including this state. Section 614.03, F. S., provides the methods by which shares of stock, issued and outstanding, may be transferred and vested in a transferee, including the delivery of a stock certificate, endorsed in blank, the delivery of such a certificate with separate assignment or other transfer, etc. This section provides that it is to be applicable although the charter or by-laws of the corporation provides that such transfers may be made only on the books of the corporation or must be registered by a registrar or transfer agent. Section 614.07, F. S., provides that "the delivery of a certificate to transfer title in accordance with the provisions of §614.03, is effectual," except as may be otherwise provided in and by §614.09, which relates primarily to fraud in connection with the transaction. Even fraud in connection with the transfer of a certificate of stock will not invalidate such a transfer if the transferee is a purchaser for value in good faith without notice of facts making the transfer wrongful (§614.10, F. S.).

Section 614.03, F. S., was derived from §1 of the uniform act, which, according to the commissioners' notes was designed to make the transfer of the stock certificate in conformity to said section operate as a transfer of the shares of stock, although at common law the registry of the transfer of the stock on the books of the corporation may have been required. According to the said commissioners' note the reason for the change was to permit the certificate to be representative of the shares of stock. See also 18 C. J. S., 931-932, §394, and especially the reference to the uniform stock transfer act. The transfer of the certificate, in those states having the uniform stock transfer act, also transfers title to the stock represented by the certificate; no entry on the books and records of the corporation is necessary to complete the transfer.

The fact that §608.39, F. S., required that where stock of Florida corporations issued in other states be reported to the corporate officers in this state and be shown on the stock lists of the corporation, there being no similar requirement as to stock transferred in other states, such section relates to the issuance of stock and not the transfers. Where certificates of stock are transferred pursuant to §614.03, such compliance with said section results in the transfer of the shares of stock evidenced by the said certificate, and no record of such transaction in this state is necessary to complete such transfer. The entry of such evidence of transfer on transfer books maintained by a foreign corporation in this state will not make the transaction a Florida one. The statutes of a state have of themselves no extra territorial force and effect (21 C. J. S. 103, §70; Hartford Accident and Indemnity Co., v. Thomasville, 100 Fla. 748, 130 So. 7, text 8). Florida is without authority to tax a transaction which takes place in another state. Florida is without authority to tax a stock transfer made and completed in another state. This brings us to the question of whether or not a transaction, such as that mentioned in the above question, was completely an out-of-state transaction. Unless some part of the transaction was transacted within this state it would not be subject to Florida transaction. The evidencing of the transaction on the corporate books maintained in Florida would not make the

transaction a Florida transaction, in whole or in part. To be subject to Florida taxation some part of the transaction must have taken place within this state. This case differs from that considered in AGO 061-59, of May 2, 1961, where the statutes required that issues of stock be shown by records which are maintained in this state; we have here involved no such a statute.

In *North American Co. v. Green*, Fla., 120 So. 2d 603, a Florida corporation, after changing the number of no-par value stock from 104 shares to 104,000 shares caused a transfer of such stock to be made from a stockholder corporation to its stockholders, for which new shares were issued to such stockholders; this was held to be a transfer under §201.04, F. S., and not an original issue of stock under §201.05, F. S. Although a substitute stock certificate was issued, evidencing the transfer of stock, such stock certificates were not subject to taxation under §201.05. Here no transaction taxable under §201.05 appears from the facts contemplated by the above question.

062-26—February 7, 1962

TAXATION

EXEMPTION—CONSTRUCTION OF PROVISION DEFINING
“EDUCATIONAL INSTITUTION”—§192.06(3), F. S.,—§16,
ART. XVI, §1, ART. IX, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Is the definition of an “educational institution” as now found in §192.06(3), F. S., a limitation on the exempting of property from taxation held by a corporation and used exclusively for educational purposes as provided in §16, Art. XVI, State Const.?

Section 16, Art. XVI, State Const., provides that “the property of all corporations . . . shall be subject to taxation unless such property be held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes.” This section of the Florida constitution was deemed self-executing in *Fleischer Studios, Inc. v. Paxson*, 147 Fla. 100, 2 So. 293, text 294; *Lummus v. Miami Beach Congregational Church*, 142 Fla. 657, 195 So. 607, text 608; *Lummus v. Florida Adirondack School*, 123 Fla. 832, 168 So. 232, text 239). In *Lummus v. Miami Beach Congregational Church*, supra, the court stated “we have the conviction that the command to tax all corporate property needs no legislation to accomplish the result intended and that the exception ‘unless . . . held and used exclusively for religious . . . purposes’ may likewise be availed of without enabling action by the legislature. . . .” From these cases it appears that §16, Art. XVI, State Const., is not dependent upon §192.06, F. S., as to the right to the exemptions mentioned.

Lummus v. Miami Beach Congregational Church, supra, involved the question of the right of the church to tax exemption of a parcel of land held and used by the church as a parking area for members and officers attending the services and functions of the church. The parking area was clearly not a house of public worship, etc., as set out in §192.06 (4), F. S. This the court recognized in its opinion, which directs attention to the difference in

application of the language of §192.06 (4), F. S., implementing §1, Art. IX, State Const., and that of §16, Art. XVI, State Const. As §16, Art. XVI, State Const. was deemed self-executing, the court found that the parking area to be held and used exclusively for a religious purpose within the purview of said §16, and exempt notwithstanding it would not meet the requirements of §192.06 (4), F. S. From this it would seem to follow that the definition of an "educational institution" in §192.06 (3), should it be in conflict with said §16 of Art. XVI, would not be controlling to the extent of the conflict.

In *Lummus v. Florida Adirondack School*, 123 Fla. 832, 168 So. 232, text 239, the court stated that under the provisions of the constitution (§1, Art. IX, and §16, Art. XVI, State Const.) "the legislature may, by enactment not inconsistent with the intendments of the constitution, define 'educational purposes' and thereby prescribe that class of property which may come within the exemption and only exempt that property which is held and used exclusively for educational purposes as defined by the legislature." It was held in *Rogers v. Leesburg, Fla.*, 27 So. 2d text 71, that the portion of §192.06 (3), F. S., relative to the rental of 75% of floor space or less, was not in violation of §16, Art. XVI, State Const.

From the foregoing we are of the opinion that the definition of "educational institution" found in §192.06(3), F. S., should be considered as a limitation on §16, Art. XVI, State Const., except to the extent said statute may be deemed to be in actual conflict with the constitutional provision, in which cases the constitutional provision controls.

This opinion relates to property held by corporations only, and should not be extended to other than corporate ownership.

062-27—February 7, 1962

ELECTORS AND ELECTIONS

SPECIAL REGISTRATION IN PARTICULAR LOCATIONS IN COUNTIES—APPOINTMENT OF DEPUTY SUPERVISORS—§§98.051, 98.281, F. S.

To: *Tom Adams, Secretary of State, Tallahassee*

QUESTION:

May a supervisor of registration place the registration books in various locations within the county other than during the months of January and February as prescribed in §98.051, F. S., and deputize persons who are not regular employees of the supervisor to assist in the registration of voters?

It is assumed from your letter and question that precinct registration is not contemplated here but rather a registration program is to be conducted in various settled sections within the county where present records indicate that voter registration is light. In this regard, I direct your attention to AGO 058-158, p. 684 of the 1957-58 biennial report of the attorney general, wherein this office previously held that a supervisor of registration could place registration books at various locations within the county so as to make registration easier, stimulate interest, and thereby increase the number of registered voters. You will note that §98.281, F. S., referred to in that opinion, authorizes the supervisor of registration

to appoint deputy supervisors to accept registration of those who are qualified in settled sections of the county as may be reasonably necessary.

It would therefore appear that §98.281, F. S., contains the necessary authority to authorize the appointment of the deputy supervisors referred to in your inquiry. This comment is, of course, conditioned upon the assumption that the deputy supervisors so employed will be volunteer workers or that the county commission has by pre-arranged agreement budgeted sufficient funds to compensate the specially employed or appointed deputies.

Conditioned upon these comments your question as set out above is answered in the affirmative.

062-28—February 8, 1962

CORRECTIONAL SYSTEM

GAIN TIME—AUTHORITY TO GRANT PERSONS INCARCERATED IN COUNTY JAIL—COUNTY PRISONERS, STATE PRISONERS—§§951.21, 944.29, F. S.

To: *Allen B. Michell, Sheriff of Broward County, Fort Lauderdale*

QUESTIONS:

1. Does either the board of county commissioners or the sheriff have the authority to grant meritorious gain time, in addition to the gain time provided by §951.21, to a person who is serving a county jail sentence?

2. Where a person who has been sentenced to the state prison takes an appeal which results in an affirmation of his conviction and remains in the county jail during the pendency of said appeal, does the sheriff's department have the authority to grant such person meritorious gain time on the time thus spent in the county jail pending such appeal?

AS TO QUESTION 1:

The allowance of gain time is a matter of clemency and no board or officer has any right to grant clemency except when authorized by law.

The only provision of law which relates to and allows gain time for persons serving sentences in county jails is §951.21, F. S., which specifies the allowances which can be made and makes no provision for the allowance of extra or meritorious gain time.

It is true that §944.29, F. S., permits the board of commissioners of state institutions, upon the recommendation of the director of the division of corrections, to allow a state prisoner extra gain time for meritorious conduct or exceptional industry, in addition to ordinary gain time. However, this statute applies only to state prisoners and does not authorize the allowance of extra gain time to a county prisoner.

It is true that the fact that provision is made for the allowance of extra gain time for a state prisoner but not for a county prisoner gives the state prisoner an opportunity to earn extra gain time which the county prisoner has no chance to earn. However, only the legislature can eliminate this disparity.

Question 1 is answered in the negative.

AS TO QUESTION 2:

Since this question relates to the allowance of extra gain time to a person who has been sentenced to the state prison, and since the sheriff has no control over the allowance of either ordinary or extra gain time to such prisoners, it is unnecessary to undertake to answer question 2.

062-29—February 8, 1962

REGULATION OF COMMERCE

INTER-AMERICAN CENTER AUTHORITY—SALARIES OF PERSONNEL—APPROVAL BY STATE BUDGET COMMISSION—CH. 554; §§216.02, 282.021(4), 282.051(3)(b), 554.07(5), F. S.

To: William W. Gibbs, Assistant County Attorney, Miami

QUESTIONS:

May the inter-American center authority without approval of the state budget commission, fix salaries of its executive and professional personnel in excess of \$10,000:

1. When the source of such salaries are exclusively proceeds of revenue bonds secured by trust indenture mortgaging real estate owned by the authority and pledging revenues from operation of the authority's facilities, and

2. When the source of such salaries is exclusively revenue from the operation of the authority's facilities?

The inter-American authority is an agency of the state created by Ch. 554, F. S. Section 554.07(5) authorizes the authority to employ certain personnel "as may be deemed necessary" and "to fix their compensation."

Section 282.051(3)(b), F. S., provides as follows:

(3) Unless approved by the budget commission during each biennium as being justifiable and in the best interests of the state:

(b) The annual rate of compensation (salaries, combined salaries, other compensation for services, and perquisites) of *any state officer or employee* shall not exceed \$10,000 per annum, except when specifically authorized by law. (Emphasis supplied.)

The foregoing provisions were formerly contained in §216.171, F. S., which has since been repealed (§2, Ch. 61-401.).

The inter-American authority being a state agency created and established by legislative act, an officer or employee thereof would be deemed to be a "state officer or employee" within the contemplation of §282.051(3)(b) as set forth above. An examination of the provisions of Ch. 216 relating to the powers and duties of the budget commission as well as the philosophy expressed in Ch. 282, F. S., would seem to indicate that the inter-American authority would fall under the jurisdiction of the state budget commission. (See §282.021(4) for the definition of state agency.)

Further, indication that the inter-American authority would be subject to the budget commission's control may be gleaned from the language found in §216.02 relating to the reports required to be furnished by state agencies as follows:

Estimates to be furnished by departments, bureaus, institutions, etc.—

(1) On or before the fifteenth day of November, biennially, prior to the meeting of the legislature, each of the several departments, bureaus, divisions, officers, commissions, institutions, boards, and *all other state agencies created by legislative act and supported by any form of taxation or licenses, fees, imposts, or exactions, hereinafter referred to as "agencies,"* shall report to the budget director the following: (Emphasis supplied.)

It should be noted that the foregoing italicized portion of §216.02(1) would seem to be sufficiently broad so as to include the proceeds of revenue bonds and revenues derived from the operation of the authority's facilities.

In light of the legislative intent and the philosophy expressed in Ch. 216 and 282, F. S., it is my opinion that the salaries of the executive and professional personnel employed by the inter-American authority would be subject to approval by the state budget commission in accordance with §282.051(3)(b) where such salaries are in excess of \$10,000 per annum.

062-30—February 9, 1962

GUARDIANSHIP LAW

GUARDIANS—DISTRIBUTION OF ESTATE OF MINOR IN
SUNLAND TRAINING CENTER—§§393.03, 393.04, 393.11,
744.03(5), (6), 744.13, 965.08(2); CH. 744, F. S.

To: *Monroe W. Treiman, President, Florida County Judges Association, Brooksville*

QUESTIONS:

Where a minor has been committed to sunland training center and such minor is entitled to receive a distributive share of an estate of another:

1. Would the board of commissioners of state institutions be authorized to receive such minor's interest under §393.04, F. S.?

2. Would such share be paid to the natural guardians of such minor pursuant to §744.13, where such share is less than \$1,000?

3. Would such share be paid to a legally appointed guardian under Ch. 744, F. S., where the amount exceeds \$1,000?

Sections 393.03 and 393.11, F. S., provide two methods by which persons may be admitted to the sunland training centers established in this state. Neither of these methods appear to require an adjudication of incompetency.

Section 393.04, F. S., provides as follows:

Board declared legal guardian of inmates.—The board of commissioners of state institutions shall be the legal guardian and custodian of all persons admitted to the sunland training center for epileptic and the mentally retarded and feeble-minded under the provisions of this chapter.

It is apparently the intent of the foregoing section to create a legal guardianship "over the person" admitted to the sunland train-

ing center. It is important to note a distinction between guardian "*over the person*" and guardian "*over the property*," which distinction will become more readily apparent.

Section 744.13 provides by statute that the "mother and father jointly are natural guardians of their own children ... during infancy." The term "infancy" is apparently synonymous with minority and embraces persons not having attained 21 years of age and should be distinguished from physical or mental incapacity. (See §744.03(5),(6).) The parents' guardianship over their own children during infancy has generally been limited to being "*over the person*" unless otherwise provided by statute. *McKinnon v. First Nat. Bank of Pensacola*, 82 So. 748. Section 744.13, in addition to creating a natural guardianship "*over the person*" during infancy, also provides for the creation of a limited guardianship "*over the property*" of a child during infancy. The guardianship over the property is limited to the handling of the infant's personal property "when the amount involved in any instance does not exceed \$1,000." (See §744.13 (2).)

In different instances, therefore, the board of commissioners of state institutions and the parents would exercise a guardianship over the person during his or her minority. The parents' guardianship over the person would appear to cease when such infant has been admitted to the sunland training center pursuant to either §393.03 or §393.11, F. S. After such admission to the sunland training center, the board of commissioners of state institutions would be the guardian "*over the person*" (infant), while the parents would be the guardians "*over the personal property*" of the infant up to \$1,000. Where an infant is to receive personal property in excess of \$1,000, it would be necessary for the county judge to appoint a legal guardian to receive and manage the infant's property (see §744.13, *supra*.)

Applying the foregoing statements to your specific inquiry where a minor who has been admitted to the sunland training center is entitled to receive some share of personal property, such personal property could be payable to the parents if the amount is less than \$1,000, and if they are living. When such share is greater than \$1,000, it would be paid to a guardian of the property legally appointed pursuant to Ch. 744, F. S., which guardian may or may not be the parents of such minor. It should be noted that the board of commissioners of state institutions would have the authority to accept "any money or other property received for personal use or benefit for any patient or inmate" not perhaps in the actual capacity of the "guardian of the property" but rather in a trust capacity as authorized by §965.08(2), F. S. Where the estate or distributive share involves large sums of money or property, the county judge should make such order as would be deemed necessary to provide the greatest protection for the property of the ward.

I trust that the foregoing information will be helpful.

062-31—February 13, 1962

PROFESSIONAL SERVICE CORPORATION ACT
VALIDITY OF INDEMNIFICATION CLAUSE IN PROFESSIONAL SERVICE CORPORATION CHARTER—CH. 621,
§621.07, F. S.

To: Tom Adams, Secretary of State, Tallahassee

QUESTION:

Would a professional service corporation charter containing a clause indemnifying the various officers in the event of malpractice proceedings violate the provisions of the newly enacted professional service corporation act, Ch. 621 F. S.?

Section 621.07, F. S., provides:

Any officer, shareholder, agent or employee of a corporation organized under this act shall remain personally and fully liable and accountable for any negligent or wrongful acts or misconduct committed by him, or by any person under his direct supervision and control, while rendering professional service on behalf of the corporation to the person for whom such professional services were being rendered. The corporation shall be liable up to the full value of its property for any negligent or wrongful acts or misconduct committed by any of its officers, shareholders, agents or employees while they are engaged on behalf of the corporation in the rendering of professional services.

It would appear from the above quoted provision that the legislature intended for officers of professional service corporations to be fully liable for any negligent or wrongful acts which they may commit or which may be committed under their supervision in connection with the rendering of a professional service. Therefore, an indemnification clause in a professional service corporation charter could not serve to relieve any officer of the corporation of personal liability in the event of negligent or wrongful acts. However, it is also to be noted that the provisions of §621.07, F. S., provide that the corporation shall also be liable up to the full value of its property for any negligence or wrongful acts committed by the officers acting on behalf of the corporation. This statutory provision implies that there is no objection to the corporation paying or sharing the loss in the event of a malpractice suit for acts of negligence, wrongdoing or misconduct on the part of its officers.

This being the case there would appear to be no objection to the corporation providing such protection for its officers. However, it is to be borne in mind that such an indemnification clause or group insurance plan within the organization would in no way relieve the individual officer involved of any obligation resulting from his own professional negligence, wrongdoing or misconduct.

It should be pointed out in passing that this opinion is not intended to settle any question as to whether this type of arrangement constitutes insurance subject to regulation as such a question could only be determined upon a complete analysis of the factual situation in each instance.

Conditioned upon the foregoing remarks, your question is answered in the negative.

062-32—February 23, 1962

TAXATION

COUNTY DEVELOPMENT AUTHORITIES—TAX EXEMPT
 STATUS OF AUTHORITY OWNED PROPERTY—CHS.
 61-2727, 57-1226, 59-727, LAWS OF FLORIDA; §192.06,
 F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Are county development authorities, with special reference to the Putnam county development authority, created by Ch. 61-2727, entitled to tax exemption or tax immunity?

Section 3 of said Ch. 61-2727, provides that "for the purpose of performing such acts as are necessary for the sound development of Putnam county, there is created a body corporate and politic to be known as the Putnam county development authority which is deemed to be a public corporation by that name, which body may contract and be contracted with and sue and be sued in all courts of law and equity." The governing board consists of 13 members, the first board being designated by the legislature and subsequent members being appointed by the governor. This authority is authorized to contract with Putnam county and the incorporated municipalities therein; the said authority being referred to as a public corporation. The powers and authority of the said public corporation are set out in §9 of said Ch. 61-2727, which includes the power "to construct, erect, acquire, own, repair, remodel, maintain, extend, improve, equip, operate and manage projects, self-liquidating or otherwise, located on property owned or leased by the authority . . ."

One of the purposes of this authority is the "performing of such acts as are necessary for the sound development of Putnam county." The court, in *State v. Cotney*, Fla., 104 So. 2d 346, text 347, relative to the Clay county development authority, established by Ch. 57-1226, which chapter is substantially identical with said Ch. 61-2727, stated that the said Clay county authority "was created 'for the purpose of performing such acts as shall be necessary for the sound planning for, and development of Clay county,' for the public good and welfare of the county, its incorporated municipalities, and its or their inhabitants." A similar authority for Suwannee county, established by Ch. 59-727, was involved in *State v. Suwannee County Devel. Authority*, which act is likewise substantially identical with said Ch. 61-2727.

It is evident that the Putnam county development authority, like the Clay and Suwannee county authorities, is a public corporation or agency designed to promote the public welfare and benefit of said county. In some jurisdictions real property of public corporations essential to the exercise of their franchises has been held tax exempt (84 C. J. S. 259, §133). It is a general rule, in the absence of express statutory authority, that public property when devoted to a public use, is tax exempt (84 C.J.S. 380 and 381, §198). "A corporation is public when created for public purposes only, connected with the administration of government, and where the whole interests and franchises are the exclusive property and domain of the government." (*Forbes Pioneer Boat Line v. Board*

of Commissioners, 77 Fla. 742, 82 So. 346, text 350). In this case the Everglades drainage district and its governing board was deemed a public corporation. It seems evident that the Putnam county development authority is either a state or county agency in the form of a public corporation designed to promote the welfare of Putnam county and its citizens and residents.

In *Park-N-Shop, Inc., v. Sparkman, Fla.*, 99 So. 2d 571, text 573, the court held "that property of the state and of a county, which is a political subdivision of the state . . . is immune from taxation, and we say this despite the reference to such property in §192.06 . . . as being exempt." This being true, we hold that the property of the Putnam county development authority is tax exempt, unless the taxing authorities find and determine that such property, or some of it, is actually being administered for some private, instead of a public, purpose, in violation of said Ch. 61-2727.

062-33—February 26, 1962

CRIMINAL PROCEDURE

PROHIBITION AGAINST DISCLOSURE OF FACTS RELATING TO FINDING OF INDICTMENT OR FILING OF INFORMATION BEFORE ARREST OF ACCUSED—§§905.26 AND 906.27, F. S.

To: *Edward M. Booth, Duval County Solicitor, Jacksonville*
QUESTION:

Under §§905.26 and 906.27, is a prosecuting attorney prohibited from divulging, to news media, the fact that an indictment has been found or an information filed, prior to the time the accused is taken into custody or admitted to bail?

Section 905.26, F. S., states that:

No grand juror, reporter, interpreter, stenographer, or officer of the court, unless the court shall so order, shall disclose the fact that any indictment for a felony has been found against any person not in custody or under recognizance, otherwise than by issuing or executing process on such indictment, until such person has been arrested.

The purpose of this statute is explained in 42 C.J.S., *Indictments and Informations*, §31b(1), where we find the following comment:

...It is a common practice to withhold from public record, and not to enter upon the docket, indictments where those accused have not previously been apprehended, and are not in custody, or under bail. *The practice is a necessary one; otherwise the parties indicted might be apprised of the fact, and escape before arrest . . .* (Emphasis supplied.)

(See also, in this connection, *State v. Knowlton*, 115 Me. 544, 99 A. 631; and *Reese v. State*, 142 Tex. Cr. 254, 151 S. W. Ed. 828). Section 906.27, F. S., reads as follows:

All indictments, informations and the records thereof shall be in the custody of the clerk of the court to which they are presented, and shall not be inspected by any person other than the judge, clerk, the attorney general

and the prosecuting attorney until the defendant is in custody or has been admitted to bail, or until one year has elapsed between the return of an indictment, or the filing of an information, after which time the same shall be open for inspection by the public, unless otherwise ordered by the court having jurisdiction.

Under §905.26, F. S., the prosecuting attorney, being an officer of the court, is clearly prohibited from *disclosing* the fact that an *indictment* for a felony has been found, other than by issuing or executing process thereon, unless the accused is in custody or under recognizance, or unless there is an order of the court to the contrary. Section 906.27 states that *indictments, informations* and the records thereof shall not be *inspected* by persons other than the judge, clerk, attorney general or prosecuting attorney, until one or more of the contingencies enumerated therein occurs.

The reason for the rule against disclosure, set out in §905.26, would appear to be just as applicable when the accusation is by information as when it is by indictment, since in either case there is danger that the party charged may abscond prior to being apprehended, arrested, or released under bail. The obvious purpose of §906.27, F. S., as well as that of §905.26, is to prevent flight prior to the time the accused has been taken into custody. Consequently, the former section would be rendered ineffective if construed so as to allow prosecuting attorneys to divulge to news media, prior to apprehension and arrest, the fact that an information has been filed, and at the same time prohibit inspection of the court records by the public. Should either disclosure or inspection be permitted, at such time, the fact that charges have been filed would become known, and the party or parties accused might be apprised of that fact and escape before arrest.

On the basis of the above, we must conclude that although §906.27, F. S., does not literally or explicitly forbid disclosure, by the prosecutor, of the fact that an information has been filed, that section, nevertheless, tacitly prohibits the prosecuting attorney from disclosing such fact to the news media, in the absence of a court order allowing disclosure, until the accused is in custody, or has been admitted to bail, or until one year has elapsed. A reading of §906.27, together with §905.26, will indicate that the same rule applies with respect to indictments found by grand juries. Your question is answered accordingly.

062-34—February 23, 1962

COUNTY SCHOOL PERSONNEL

CONTINUING CONTRACTS—TEACHER RESIDENCE REQUIREMENTS—§231.36, F. S.

To: Thomas D. Bailey, State Superintendent of Public Instruction, Tallahassee

QUESTIONS:

1. Where a teacher in the public school system of a county of the state is under continuing teaching contract and the board of public instruction of the county involved has a policy that all teachers in the school system in the county must be residents of the county, is the board authorized to terminate such continuing contract

where the teacher moves her permanent residence out of the county?

2. Would the answer be the same where the board adopted the policy requiring all teachers to be residents of the county after the continuing contract with the teacher involved had gone into effect?

Section 231.36, F. S., provides in part:

... Each member of the instructional and administrative staff in each county school system, except in counties operating under local, special or general tenure laws with stated population application who holds a regular certificate based at least on graduation from a standard four-year college, who has completed three years of service in a county of the state, who has been reappointed in such county for the fourth successive year, and who has met the requirements of §231.16 (2) relating to comprehensive examination and score thereon, *shall be entitled to and shall be issued a continuing contract in such form as may be prescribed by regulations of the state board;* provided, that the period of service provided herein may be extended to four years when prescribed by the county board and agreed to in writing by the employee . . . (Emphasis supplied.)

This act is mandatory and the continuing contract provided must be issued to the teacher in the event all requirements of the act are met.

Residence of the teacher in the county concerned is not a condition provided by the legislature. I do not believe that a residence requirement could be imposed as a reasonable condition of employment by county board regulation except in such cases where it could be clearly shown that the teacher was residing at such a great distance from the school where she teaches that she could not properly discharge her normal duties and responsibilities.

Subject to the above observations, both of your questions are answered in the negative.

062-35—February 26, 1962

TAXATION

DOCUMENTARY STAMPS—CERTIFICATES OF TITLE,
DEEDS TO ENCUMBERED PROPERTY—§§201.02
and 702.02, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. What is the proper amount of documentary stamp taxes required, where the property conveyed is encumbered by a mortgage or lien, of which no mention is made in the said conveyance?

2. What is the proper amount of documentary stamp taxes required, where a clerk's certificate of title, issued pursuant to §702.02, F. S., is issued subject to an outstanding mortgage?

Section 201.02, F.S., imposes a documentary stamp tax, of 20c "on each one hundred dollars of the consideration paid therefor." In *Culbreath v. Reid*, Fla., 65 So. 2d 556, text 557, the court, referring to said §201.02, said that "the statute in question applies only to

a monetary consideration," and held that where a conveyance was made in consideration of the grantor's love and affection for the grantee, without the passing of monetary consideration, there was no documentary stamp taxes due on the transaction. In *DeVore v. Gay*, Fla., 39 So. 2d 796, text 797, the court, also considering the application of §201.02, stated that "when taxes are levied according to a monetary consideration, the law contemplates that such tax shall be confined to the actual monetary consideration or to considerations which have a reasonably determinable pecuniary value."

The court in *Alabama-Fla. Co. v. Mays*, 111 Fla. 100, text 108, 149 So. 61, stated that "it is conceded that, where a grantee takes a conveyance subject to a mortgage, he *will be presumed to have included the mortgage debt in the purchase price . . .*" (Emphasis supplied.) This holding of the court was recognized and concurred in, by the per curiam opinion, in *Alabama-Fla. Co. v. Mays*, 111 Fla. 783, 149 So. 661. In *Spinney v. Winter Park Bldg. and Loan Ass'n.*, 120 Fla. 453, 162 So. 899, text 903 and 904, the court stated that "we must arrive at the conclusion that a subsequent purchaser who takes title subject to a prior existing recorded mortgage upon the property *is presumed to have included the mortgage debt in the purchase price* and is estopped to defend against the foreclosure of such mortgage upon the grounds of usury . . ." (Emphasis supplied.) The *Alabama-Fla. Co. v. Mays* cases were recognized by the district court of appeals, 3rd district, in *Zimmerman v. Hill*, Fla. App., 100 So. 2d 432, text 433. In 59 C.J.S. 561, §397, it is stated that "*it may be presumed that a purchaser subject to a mortgage bought the land at its value, less the amount of the indebtedness secured by the mortgage, and that he included the mortgage debt in the purchase price.*" (Emphasis supplied.) See also 3 *Pomeroy's Equity Juris.*, 5th Ed., 615, §1205, to the same effect. This presumption is not a conclusive one which may be overcome by proof that no such assumption was in fact made.

Under both questions 1 and 2 the proper amount of documentary stamp taxes is 20c "on each \$100 of the consideration paid therefor." Applying the presumption above mentioned that an outstanding mortgage indebtedness *is presumed to be included* in the purchase of the lands purchased, the amount of documentary stamp taxes will be measured by the consideration paid, including the amount of the outstanding mortgage. This answers question 1.

Where a court enforces a mortgage indebtedness through a foreclosure proceeding it deals merely with the mortgage and the indebtedness secured, and not with other mortgages and liens other than to determine their priority with the lien being foreclosed; in the absence of a counter-claim or cross bill seeking foreclosure in the same proceeding. Unless there be evidence in connection with a purchaser's bidding at the foreclosure sale or otherwise, evidencing an intention to assume the encumbering mortgage, we do not believe that there may be said to be a presumption of assumption of other encumbering mortgage indebtednesses by the purchaser at the foreclosure sale by the clerk of the court. This seems to answer question 2 as well as it may be answered under the facts revealed.

062-36—February 26, 1962

TAXATION

CONSTRUCTION OF §205.322, F. S.—PERMITS REQUIRED FOR TRAVELING SHOWS—CH. 205, §§205.31, 205.32 AND 205.60, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

When are traveling shows, exhibitions and amusement enterprises, as defined in §205.322, F. S., required to obtain a permit from the state comptroller?

Section 205.322, which was derived from Ch. 61-273, in so far as here material, provides that "it is unlawful for any person to engage in the business of traveling shows, exhibitions or amusement enterprises including (without in any manner limiting the general terms) circuses, carnivals, rodeos, riding devices, traveling animal shows, ice shows, vaudeville, minstrels, theatrical games or tests of skills, dramatic repertoires or other shows and amusements, operating within or without any tent, structure or enclosure permanent or temporary in nature, which shall operate in a city, town or county of the state for a period of less than 30 days, without having first obtained from the comptroller of the state a permit so to do for each location where appearing Such permit shall be issued by the comptroller upon a sworn written application by the applicant. The application shall state the nature of the show or exhibition and shall list thereon the number of attractions, concessions or units, including any gaming devices to be operated, at what place or places within the state, and for what period of time such applicant for the permit shall remain for the purpose of giving performances, exhibitions and/or operating concessions In addition to any license now or hereafter provided by law such applicant shall at the time of making such application pay a fee of \$50 to the comptroller of the state for the issuance of the permit Nothing contained in this act shall be construed to exempt any applicant from the payment of all licenses required by state law and existing city ordinances. The permit when issued shall be in quintuplicate, shall not be assignable and shall be valid only for the person in whose name it is issued No county tax collector or other state or county officer or employee shall issue a license to any person whomsoever engaging in any business subject to the provisions of this act until such applicant named in the permit shall first display such permit duly granted by the comptroller of the state as herein provided. . . . Upon the issuance of the required license by the county tax collector to any such applicant a copy of the permit and license showing the nature of the show or exhibitions, a list of attractions, concessions or units to be operated, at what place or places in the county, and for what period of time, shall be delivered to the sheriff of the county as information Any person who shall carry on or conduct any temporary business or amusement, subject to the provisions of this act, for which a permit and license is required without first obtaining such permit and license and thereafter strictly complying with the provisions of this act shall be deemed guilty of a misdemeanor. . . ." (Emphasis supplied.)

The provision making the statute applicable to those persons

operating for periods of less than 30 days appears to have been introduced into the statutes by Ch. 25248, 1949. The statute first appeared as Ch. 17760, 1937, which was brought into the Florida Statutes as §205.31. Under said Ch. 17760, and said §205.31, the permit fee was fixed at \$5, which remained unchanged until increased to \$15 by Ch. 25248, 1949. This permit fee was increased to \$50 by Ch. 59-167, at which amount it now stands. Persons so engaging in the business of traveling shows, etc., within this state are required by said §205.322 to obtain separate permits "for each location where appearing." No general permit is provided for by the statutes and laws of Florida. This permit fee is in "addition to any license now or hereafter provided by law" and required of the applicant.

Although the application for such a permit is required to "state the nature of the show or exhibition and shall list thereon the number of attractions, concessions or units including any gaming devices to be operated, at what place or places within the state, and for what period of time such applicant shall remain for the purpose of giving performances, exhibitions, or operating concessions," we find no power or authority on the part of the state comptroller or any other officer, board or commission, to reject such application and refuse a permit for cause. The regulation under the statute by the state comptroller or other officer, board or commission is very limited, if at all. The permit required appears to be in the nature of an occupational license for the carrying on of a business, profession or occupation, within the purview of §205.01, F. S. The fee for the permit has all the appearances of an imposition for revenue purposes. It appears to be just another license tax. In *Harry E. Prettyman, Inc. v. Fla. Real Estate Comm.*, 92 Fla. 515, 109 So. 442, text 445, the court quoted with approval from 37 C. J. 168, §4, that "a license is merely a permit or privilege to do what otherwise would be unlawful" The said expression from *Corpus Juris* was also cited with approval by the court in *State v. Stein*, 130 Fla. 517, 178 So. 133, text 135. To the same effect see also 53 C. J. S. 445, §1, notes 3 and 4, where the author states upon authority cited, that "the words 'license' and 'permit' often are used synonymously." The word "license" is defined in *Black's law dictionary* as a "certificate or the document which gives permission." There may be an overlapping of §§205.32, as implemented by §§205.321 and 205.60, F. S., where the shows, exhibitions or amusement enterprises perform for a period of less than 30 days; however, in light of the provision in said §205.322, that the license or permit fee therein provided is "in addition to any license now or hereafter provided," it is clear that it does not replace or supplant the license taxes imposed under §§205.32 and 205.60 above mentioned, but is an additional tax.

The court, in *Miami Beach College Corp. v. Tomlinson*, 143 Fla. 57, 196 So. 608, text 609, considering a municipal ordinance imposing license taxes on certain businesses, stated that "in its larger significance, the term business has reference to any livelihood or employment in which one makes his living." In *Texas Co. v. Amos*, 77 Fla. 327, 81 So. 471, text 472, under a similar statute it was held that the term business used in this connection was used in the trade or commercial sense, "one carried on with a view to profit or livelihood." See also to the same effect *Harper v. England*, 124 Fla. 296, 168 So. 403, text 406, and 53 C. J. S.

556, §26). The phrase in the first part of §205.322, making it unlawful for persons to "engage in the business of traveling shows, exhibitions or amusement enterprises," unless and until the permit required by said section is obtained, has reference to those persons engaged in betting on traveling shows, exhibitions and amusement enterprises with a view to profit or obtaining a livelihood. Where the primary purpose of the person putting on such shows, exhibitions or amusement enterprises is the procuring of a profit or obtaining a livelihood, or both, from such operation, the same will constitute a business within the purview of said §205.322, F. S.

From the above it appears that persons owning or putting on traveling shows, exhibitions and amusement enterprises, as contemplated by §205.322, F. S., are required to obtain the permit, and pay the permit fee, required by said section where the same are carried on with a view to profit or a livelihood. If the show, exhibition or amusement enterprise is within the purview of any other section of Ch. 205, or any other section of the Florida Statutes, then in addition to the permit and permit fee imposed by §205.322, the impositions of such other statute or statutes must also be complied with.

062-37—February 26, 1962

TAXATION

EXEMPTIONS—EDUCATIONAL INSTITUTIONS OPERATED
BY INDIVIDUALS OR PARTNERSHIPS—§192.06, F. S.; §1,
ART. IX and §16, ART. XVI, STATE CONST.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Is property owned by individuals or partnerships, and actually occupied, held and used by such owners for educational purposes, exempt from ad valorem taxation, both real and tangible personal property taxes?

For the purposes of this opinion we shall consider a partnership as an association of two or more individuals engaged in the business of educating children of school age, whether referred to as a partnership, an association or otherwise, but not as extending to corporations.

Under §192.06, F. S., "such property of *educational*, literary, benevolent, fraternal, charitable and scientific institutions within this state, as shall actually be occupied and used by them," for educational, literary, benevolent, fraternal, charitable or scientific purposes, is granted tax exemption from ad valorem taxation. This statutory provision was enacted under and pursuant to §1, Art. IX, State Const., which authorizes the legislature to exempt such real and personal property from taxation as is held and used "for municipal, education, literary, scientific, religious or charitable purposes." This section of the state constitution relates primarily to property of individuals and partnerships, not corporations; the tax exemption for property of corporations "held and used exclusively for religious, scientific, municipal, *educational*, literary and charitable purposes," is regulated by §16, Art. XVI, State Const.

These constitutional provisions have been deemed by the courts of this state "as a limitation upon the power of the legislature to provide for the exemption from taxation of any classes of property

except those particularly mentioned classes specified in the organic law itself." (*L. Maxcy, Inc. v. Fed. Land Bank*, 111 Fla. 116, 150 So. 248, text 250; *State v. St. John*, 143 Fla. 544, 197 So. 131, text 134; *State v. Doss*, 146 Fla. 752, 2 So. 303, text 304). In short, for property to be tax exempt under §1, Art. IX, State Const., as implemented by §192.06, F. S., it must be held and used exclusively for one or more of the purposes mentioned in said §1, Art. IX, State Const., which purposes are the same as those mentioned in §16, Art. XVI, State Const., necessary to entitle corporate property to tax exemption. Section 192.06, F. S., must be construed as being limited by said §1, Art. IX, State Const., to the purposes therein mentioned.

We being here concerned with claims for exemption from ad valorem taxes based upon such property's use for educational purposes, it becomes necessary that we give consideration as to what constitutes an exclusive use for educational purposes. In this connection the proviso in §192.06 (3), F. S., that where not more than 75% of floor space of said building or property is rented, and the rents, issues, and profits of said property are used for educational, literary, benevolent, fraternal, charitable or scientific purposes of the institution, may become material in some instances. The weight of evidence necessary to prove that a particular property is held and used exclusively for one or more of the purposes mentioned in the constitution may become material in some instances.

There are numerous schools and educational institutions being operated throughout the state by individuals, partnerships and other groups. These schools and educational institutions vary in size, facilities and financial worth. Some of the larger of such schools and educational institutions own campus areas upon which are located their housing facilities, classrooms, offices, libraries, dormitories, kitchens, conference rooms, and other facilities, necessary or convenient for the operation of the said school or educational institution. Other operators of such schools and educational institutions operate in their homes or apartments. In some instances the larger schools and educational institutions provide homes or apartments for some of their officers and teachers, usually without rent or other payment therefor by such officers and teachers. Doubtless this housing is deemed a part of such officer's or teacher's compensation. We are here primarily concerned with schools and educational institutions operating primary and secondary schools, as well as nursery and kindergarten schools. We doubt the application of the provisions for tax exemption to nurseries and kindergartens unless operated as educational facilities to the extent possible with children of their age. Schools and educational institutions giving courses comparable to those contemplated by the Florida school code for nursery and kindergarten schools, elementary and secondary schools, would seem to be within the exemption laws if their property is held and used exclusively for educational purposes. Such schools and educational institutions should also maintain the minimum standards for private schools required by Ch. 247, F. S.

As the constitutional provisions for tax exemption in both §1, Art. IX, and §16, Art. XVI, State Const., permit such exemption only when the property is held and used exclusively for one or more of the purposes mentioned therein, litigation involving exemptions for the purposes mentioned, other than for educational pur-

poses, are of proper authority when construing exemption for property held and used exclusively for educational purposes. The court, in *Univ. Club v. Lanier*, 119 Fla. 146, 161 So. 78, text 79, remarked that "it is only property that is held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes which may be exempted from taxation under the constitution."

"The fundamental ground upon which all exemptions in favor of charitable institutions are based is the benefit conferred upon the public by them, and the consequent relief, to some extent, of the burden upon the state to care for and advance the interests of its citizens." (*Miami Battlecreek v. Lummus*, 140 Fla. 718, 192 So. 211, text 217). "Exemptions from taxation will be granted by the sovereign only when and to the extent that it may be deemed that such exemption will conserve the general welfare" (*Lummus v. Cushman*, Fla., 41 So. 895, text 897). In 84 C. J. S. 533, §281, the statement is made that the "underlying reason for the exemption is that it is given in return for the performance or functions which benefit the public." See also 84 C. J. S. 413, §215, relative to *purpose and public policy*, and 51 Am. Jur. 524, §522, generally. "Thus, exemptions are not based on the favoring of particular persons or corporations at the expense of taxpayers generally, or granted on any idea of lessening the burdens of individual property owners, but are based on the accomplishment of public purposes, and are granted on the theory that they will benefit the public generally." (84 C. J. S. 413 and 414, §215). The private school relieves the state and county of the expense of educating the students thereof, through the grades taught such students in such private schools. This theory of tax exemption for educational institutions applies alike to such schools whether incorporated or not. To be entitled to such tax exemption the use of the school property for educational purposes must be an exclusive use.

Under the constitution and statutes of this state the property of parochial, church and nonprofit private schools, colleges and universities "conducting regular classes and courses of study required for eligibility to, certification by, accreditation to or membership in the southern association of colleges and secondary schools, state department of education (of Florida), or the Florida council of independent schools," are entitled to tax exemption when, and only when, their school properties, both real and personal, are held and used exclusively for educational, literary, scientific, religious or charitable purposes. Whether or not such property is held and used exclusively for one or more of the purposes mentioned is largely a question of fact to be determined by the assessor of taxes, in the first instance, from the proofs and evidence laid before him by the owner thereof and such other information as the said assessor of taxes may gather. Whether the educational institution be incorporated or unincorporated, the requirement is, that to be qualified for tax exemption, the property of such institution must be held and used exclusively for one or more of the purposes mentioned in §1, Art. IX, and §16, Art. XVI, State Const. Section 16, Art. XVI, of the constitution, being self-executing, the legislature is without power or authority to limit the exemption granted by said section and article of the said constitution; however, §1, Art. IX, State Const., requires legislation on the question before the exemption may be applicable to individuals and partnerships. Prior

to the amendment of §192.06 (3), F. S., by Ch. 61-266, the exemptions of incorporated institutions (under §16, Art. XVI, State Const.), and of individuals and unincorporated institutions (under §1, Art. IX, State Const., as implemented by said §192.06 (3)) were without any material difference. Even after the said 1961 amendment we doubt that there is any material difference between the exemptions allowed corporations under said §16, Art. XVI, State Const., and the exemption allowed individuals and partnerships under said §1, Art. IX, State Const. and implementing legislation.

What is, and what is not, *an exclusive use* for one or more of the purposes mentioned in the said constitutional provisions, presents difficulties on occasions. In *Rast v. Hulvey*, 77 Fla. 74, 80 So. 750 (Duval county), and *Amos v. Jacksonville Realty and Mortgage Co.*, 77 Fla. 403, 81 So. 524, (Clay county) one George W. Hulvey operated a private military type school in Clay county, in an old hotel building, during the years 1914 and 1915, and a like school in a group of buildings in Duval county during the year 1917 (and maybe 1916), in each instance housing himself and family on the property claimed to be tax exempt because of the operation of the said school. In each case the court held that, because Hulvey and his family resided on the lands claimed to be exempt, that there was not an exclusive use for one or more of the purposes mentioned in §1, Art. IX, and §16, Art. XVI, State Const. No attempt to sever the property upon which Hulvey resided with his family from that not so used appears from the opinions in these cases.

In *Lummus v. Florida Adirondack School*, 123 Fla. 832, 168 So. 232, the school in question was operated, as an adjunct to a like school in another state, in this state for only three months out of each 12 months, but was used for no other purpose during the remaining nine months. Although used as aforesaid for only three months out of the year, the operation of the school in Florida, regardless of the fact that operation for the remainder of the school year was carried on in another state, was held to be an exclusive use within the constitution and statutes of Florida. In *Johnson v. Sparkman*, 159 Fla. 276, 31 So. 2d 863, a labor union claimed tax exemption for its lodge building, basing its claim on §1, Art. IX, State Const., and its implementing statute, §192.06, F. S.; however, the court finding that the exclusive use of the property was not confined to one or more of the purposes mentioned in said §1, Art. IX, State Const., denied the claimed tax exemption. We gather from the opinion that the court did not deem the operation of the labor union an exclusive use for one or more of the purposes mentioned in the above cited constitutional provisions. This case was decided prior to the introduction of subsection (10) into said §192.06. In this case the court remarked that "property exempt from taxation under the constitution for charitable purposes has reference only to such property as *is dedicated to the public and used exclusively* for that purpose," or other purpose mentioned in §§1, Art. IX, and 16, Art. XVI. "Mere incidental use for such purposes is not enough."

In *Simpson v. Bohon*, 159 Fla. 280, 31 So. 2d 406, the Elks Club, Inc., of Jacksonville, used the upper stories of its lodge building in Jacksonville for lodge purposes and rented the lower stories, using a large part of the income from such rentals for

paying off a mortgage obligation encumbering the building, such mortgage evidently being a purchase money one. The use of the rental income for paying off the said mortgage was held not to be a use within said constitutional provisions and §192.06, F. S. In *Univ. Club v. Lanier*, 119 Fla. 146, 161 So. 78, it was stated that "it is a general rule that the exemption is determined by the use and ownership of the property, and not altogether by the charter of the institution which owns or uses that property. It is only the property that is held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes, which may be exempt from taxation under the constitution."

Our examination of cases dealing with living quarters for the personnel of religious, scientific, educational, literary or charitable institutions and their status as exempt property seems to reveal two lines of authority, one line holding that such property is not entitled to tax exemption, and the other holding that it is. The first line appears from the number of cases decided to be the minority rule. There is some indication that the two rules may be the effect of the application of a strict rule in some cases and a more liberal rule in other cases. The second rule may be based on the fact that the particular facility was necessary to the efficient operation of the school or institution. (See annotation in 15 A. L. R. 2d 1064, et seq.). The Texas cases seem to appear to be conflicting, in that where the owner resided on the school lands with his family such property was held not to be used exclusively for educational purposes, and therefore not tax exempt; however, in two other cases where the occupants were teachers the property was held to be tax exempt. In *Application of Clarkson Memorial College*, 77 N. Y. S. 2d 182, dwellings owned by the college and rented to faculty members were held tax exempt, as being used exclusively for an educational purpose; however, in *Western Reserve Acad. v. Board of Tax Appeals*, 153 Ohio St. 133, 91 N. E. 2d 497, the opposite conclusion appears to have been reached. In *College of Paterson v. Paterson*, 21 N. J. Misc. 29 A. 2d 402, the court remarked that "while living quarters provided by a school for its president may be entitled to exemption under certain circumstances . . . nevertheless if, as here, an undue proportion of the total school property appears to be provided for such purpose, that fact will be taken into account in the determination of the question as to whether the property is, as an entirety, devoted primarily to philanthropic school purposes." In this connection see annotation in 15 A. L. R. 2d 1064-1076.

The Florida court, in *Riverside Military Acad. v. Watkins*, 155 Fla. 283, 19 So. 2d 870, appears to have been of the view that properties of educational institutions, such as dormitories, barracks, classrooms, athletic fields and other installations adapted to the mental, moral and physical training of students, are entitled to tax exemption under Florida law. In *Taylor v. Board of Public Instr.*, 157 Fla. 422, 26 So. 2d 180, the court upheld the authority of the board of public instruction in Lafayette county to borrow funds for the purpose of erecting or purchasing teachers' homes, one at Mayo and the other at Day. The court in this case further stated that the legislature, evidently through the Florida school code, "has, in unmistakable terms, relegated to the discard some traditional educational concepts, hagridden by provincial philosophies, that time and experience have outmoded" These cases are presented to

demonstrate the evolution of educational theories and practices in recent years, at the state and county level. Chapter 247, F. S., evidences a legislative intent to require that private schools keep pace with the advances of public education and place their pupils on the minimum standards requirement of pupils of the public schools.

From the above and foregoing we arrive at the general conclusion that tax exemption may be allowed properties of persons and partnerships, as well as corporations, operating schools and educational institutions, when and only when such property is held and used exclusively for educational purposes, or for some scientific, religious, literary or charitable purpose performed in connection with such educational purpose. Difficulties often arise when determining whether such property is held and used exclusively for one or more of such purposes; for example, in *Rast v. Hulvey*, 77 Fla. 74, 80 So. 750, and *Amos v. Jacksonville Realty and Mortgage Co.*, 77 Fla. 403, 81 So. 524, the fact that the owner of the school property with his family resided on the property made the educational use not an exclusive one. That is, the facts involved in these cases failed to show an exclusive educational use. We do not feel that these cases would prevent a showing that notwithstanding such residence on the property its use for educational purposes was an exclusive one. Doubtless a stronger showing would have been made for tax exemption had it been shown that the members of the family, of substantial maturity, were each engaged in operating the school. Where the children of the owners attend the said school such fact would not seem to mitigate against an exclusive use. Where one of the spouses operates a school upon the property where both of them reside, but such other spouse is employed or maintains his or her business elsewhere, unconnected with the operation of the school or educational institution, then there does not appear to be an exclusive use of the property for one or more of the purposes mentioned in the state constitution.

Although in the *Rast v. Hulvey*, and *Amos v. Jacksonville Realty and Mortgage Co.* cases, there was no application to sever, and no severance of the portion used exclusively for educational purposes from that portion not so used, the court in subsequent cases has held "if severable that part used for . . . religious, scientific, municipal, educational, literary or charitable purposes, may be exempt from taxation while that part used for profit may be taxed." (*State v. Doss*, 150 Fla. 491, 8 So. 2d 17, text 18, and authorities cited). The court, in *Gwin v. Tallahassee, Fla.*, 132 So. 2d 273, 286, stated that in *State v. Doss*, supra, "we held that in a multiple floor building the floors used exclusively for the fraternal organization's purpose could be separated from those parts or floors of the building which were rented at a profit." This same practice appears to have been followed in *Simpson v. Bohon*, 159 Fla. 280, 31 So. 2d 406, to which the court raised no objection.

The proviso in §192.06 (3), F. S., that for tax purposes reference to educational institutions and the like "means state tax supported, parochial, church and nonprofit private schools, colleges and universities conducting regular classes and courses of study required for eligibility to, certification by, accreditation for eligibility to membership in the southern association of colleges and secondary schools, state department of education or the Florida council of independent schools," which otherwise conform to the statutory and constitutional requirement of being held for and used exclusive-

ly for educational purposes as contemplated by §1, Art. IX, State Const. In other words, those schools and educational institutions meeting the requirements of the Florida department of education, the Southern Ass'n of colleges and secondary schools, and Florida council of independent schools, are entitled to tax exemption where the properties claimed to be tax exempt *is held and used exclusively* for educational, scientific, literary, or other purposes mentioned in §1, Art. IX, and §16, Art. XVI, State Const. The guiding star is the exclusive use of the property claimed to be tax exempt, for one or more of the said purposes, and a holding of such property for such use. Unless the property meets these requirements it is not entitled to tax exemption. The use of the property is largely a question of fact to be determined by the tax assessor in the first place. Property held and used for a non-tax exempt purpose is not entitled to tax exemption.

These observations answer the question posed above in the affirmative, when such property is *held and used exclusively* for educational purposes, or for one or more of the other purposes mentioned in §1, Art. IX, and §16, Art. XVI, State Const., that is, religious, scientific, literary, or charitable purposes, within the rules and regulations above mentioned and referred to.

062-38—February 28, 1962

TAXATION

COOPERATIVE APARTMENT CORPORATIONS—STOCK IN AS INTANGIBLE—TAXATION—§§608.13 (12), 611.38 F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Should shares of stock or interests in cooperative apartment corporations in this state be assessed for taxation as intangible personal property?

The cooperative apartment in question was organized and incorporated under former Ch. 611, F. S., and especially §611.38 thereof, as a cooperative apartment corporation or association, with an authorized capital of 11,353 shares of common stock of the par value of \$0.50 per share, which authorized capital was reduced to 10,214 shares of the same par value. Said Ch. 611, F. S., was included in the general revision and reenactment of the corporate statutes and laws now appearing as Ch. 608, F. S. (see §608.13 (12), F. S., regulating the incorporation of cooperative associations). The charter provisions contain limitation upon the powers of the corporation and its stockholders and officers, one such limitation requiring that conveyances, deeds, mortgages, leases and the like, other than that of cooperative living quarters, must have the approval of at least 80% of the stockholders.

Cooperative apartment houses are defined in Webster's dictionary as "an apartment house held by several persons, usually as stockholders in a corporation in which title is vested, or as beneficiaries under a trust agreement, title being in the trustee." The buyer of a cooperative apartment occupies a dual role in his dealings with a cooperative apartment corporation; that of stockholder and that of tenant. Proprietary leases of apartments in cooperative apartment houses usually prohibit the severance of one such role from the other. Courts in adjusting the rights of stockholders-lessees

have looked to the proprietary lease, the subscription agreement and the corporate charter and by-laws, holding that each complements the others (*Tompkins v. Hale*, 15 N.Y.S. 2d 854). The municipal court of appeals for the District of Columbia, in *Hicks v. Bigelow*, 55 A. 2d 924, text 926, referring to certain New York cases, stated that "in one New York case the court declared that 'the tenant stockholders in a cooperative apartment building are concerned in the purchase of a home.' And the court said further 'the primary interest of every stockholder was in the long term proprietary lease alienation of which the corporation had the power to restrain . . . the stock was incidental to the purpose and afforded the practical means of combining an ownership interest with a method for sharing proportionately the assessments for maintenance and taxes. . . . Such purchaser is more than a mere tenant or lessee.'"

In *Kuhns v. Horn*, Or., 355 P. 2d 249, text 253, the court remarked that cooperative associations are neither partnerships nor ordinary business corporations. In *Penthouse Prop. v. 1158 Fifth Ave.*, 11 N. Y. S. 2d 417, text 423, it was stated that corporate stock issued by cooperatives are called into existence with restrictions inherent in such cooperatives, with the consent of all concerned. Such stock was held to be incidental to the main purpose of cooperative apartments and affords the practical means of combining an ownership interest with a method of sharing proportionately the costs of maintenance, taxes, etc. With cooperatives the capital stock is but a mere incident to that of residence and maintenance of the property. The cooperative corporation may be likened to the trustee where a trust arrangement instead of a cooperative arrangement is used. Professor Charles E. Nieman, writing on cooperative corporations in *Law and Contemporary Problems*, Vol. XIII, p. 393, states that there is a growing realization that the capital of a cooperative is essentially different from that of a business corporation.

As the name implies, a cooperative association or corporation is an organization formed for the mutual benefit of its members or for the prosecution of a common enterprise. Here the common enterprise is the owning and maintaining of a multiple unit apartment building, owned by the cooperative, as well as maintained by it, and the separate occupation of the apartments by the members of such association. The ownership of the apartment, its maintenance, etc., is in common, but the occupancy of the apartments is a separate occupancy. Although each apartment occupant holds one or more shares of the stock issued by the cooperative apartment building association or corporation, such stock, through agreement between all stockholders and occupants, is so tied in with the apartment rights, their occupancy and general operation, that such stock may not be separated from the right of occupancy of the apartment. No valuation of the stock separate from that of the apartment occupancy may be made under the existing contract. The two seem to be inseparable.

Therefore, the above stated question is answered in the negative, except where under any particular case such stock may be valued separate and apart from the right of occupancy.

062-39—March 2, 1962

REGULATION OF TRADE AND COMMERCE

TRADING STAMP COMPANY, APPLICATION—SUFFICIENCY
OF SURETY—INSOLVENCY OF PRINCIPAL—§§559.01-
559.06, F. S.*To: Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

May the state comptroller reject the application of a trading stamp company, notwithstanding the offer of a solvent and duly qualified surety bond, because of the insolvency or unsound financial condition of the said trading stamp company and principal on said bond?

The title of Ch. 59-311, among other things, gave notice of the inclusion in said act, relating to the regulation of trading stamp companies, a provision "requiring statements of financial worth" by the applicant. This chapter became §§559.01 to 559.06, F. S., inclusive. Under §559.04, F. S., relating to the information required of such applicants, the applicant for leave to become a trading stamp company in this state must include with his application "a short form of its balance sheet, as at the end of its last fiscal year prior to such filing, certified by an independent public accountant."

Under said §559.04 the applicant is required to post a surety bond with the state comptroller in a penal sum of not less than \$10,000, such bond evidently expiring July 1 of the fiscal year for which filed, and annually thereafter on July 1 of each year. Although the bond appears to expire at the end of the fiscal year for which posted, we find no provision in the statutes permitting cancellation by the surety prior to the end of the fiscal year affected. The purpose of these bonds does not appear to be the underwriting of the solvency of the trading stamp company, but to guard against the default of the trading stamp company. We therefore hold that it was not the legislative intent that a trading stamp company may qualify and be entitled to qualification as such a company when financially insolvent or in a questionable financial condition, even though a proper surety bond, with proper sureties, be posted with the state comptroller. The bond does not underwrite the solvency of a trading stamp company, and agree to pay its defaults without limit. The statutes doubtless contemplate that for a trading stamp company to qualify as such in Florida it must be financially sound, and this without regard to the bond posted by it.

The above stated question is, therefore, answered in the affirmative.

062-40—March 5, 1962

DISABILITY INSURANCE

CONSTRUCTION OF INSURANCE CONTRACTS RELATING TO MEDICAL PRACTICE—CHS. 461, 458, 459, 460, 466;

§§461.01, 461.03, 461.04, 458.13, (1), (2), F. S.—§§801-

812, REVISED STATUTES OF 1892; §§1157-1159,

GENERAL STATUTES OF 1906; CHS. 3296,

3881, 4698, 8415, 12197, 15911, LAWS OF

FLORIDA, 1881, 1889, 1899, 1921, 1927

AND 1933 RESPECTIVELY

To: J. Edwin Larson, State Treasurer and Insurance Commissioner, Tallahassee

QUESTION:

Does one licensed to engage in the practice of chiropody under the provisions of Ch. 461, F. S., come within the purview of a disability contract providing for the payment of medical expenses in connection with injury or illness wherein by terms of such contract a physician is defined as "one licensed to practice medicine"?

We have examined the provisions in several insurance policies for payment or reimbursement of medical expenses incurred by the insured and find that the provisions therein relative to the medical proof of loss, and by whom such medical proof of loss shall be made of one such policy require that such medical proof of loss be by "a licensed doctor of medicine or osteopathy"; and others require that such medical proof be by a "legally qualified physician or surgeon," "physician or surgeon legally licensed to practice medicine," "duly licensed doctor of medicine (M.D.)," "person who is legally licensed to practice medicine," "legally qualified physician," and "person who is legally qualified to practice medicine and perform surgery." The insurance policies after execution and delivery have the force and effect of legal contracts. Primarily we are charged with the construction of words and phrases in a contract, not in a statute or law.

The court in *Ehrlich v. Barbatsis Holding Co.*, Fla., 63 So. 2d 911, text 913, stated that "courts should attempt to give words and phrases used in contracts the natural meaning or that meaning most commonly understood when considered in reference to the subject matter and circumstances." To the same effect see also *Rupp Hotel Operating Co. v. Donn*, 158 Fla. 541, 29 So. 2d 441, text 445; and 17 C.J.S. 717, §300; and 12 Am. Jur. 758 and 759, §236. A further fundamental rule of the construction of contracts is that doubtful or ambiguous language of a contract is to be construed against the party who drew the contract or chose the language used (7 Fla. Jur. 152, §87; 12 Am. Jur. 795, §252; 17 C.J.S. 751, §324). From these authorities, where the meaning of a word or phrase used in a written contract is doubtful as to use, such word or phrase should receive its usual and natural meaning, and that when such words are used in an insurance policy they should be construed against the insurer and in favor of the insured when the contract is cast in the language of the insurer. This rule has been applied to insurance contracts in *Inter-Ocean Cas. Co. v. Hunt*, 138 Fla. 167, 189 So. 240, text 242; *Poole v. Travelers Ins.*

Co., 130 Fla. 806, 179 So. 138, text 141; *Martin v. Sun Ins. Office*, 83 Fla. 325, 91 So. 363, text 366.

A physician is defined in Black's law dictionary as "*a practitioner of medicine; a person duly authorized or licensed to treat diseases; one lawfully engaged in the practice of medicine, without reference to any particular school.*" The "practice of medicine" as ordinarily and popularly understood has relation to the art of preventing, curing or alleviating disease or pain. Popularly, it consists in the discovery of the cause and nature of disease, and the administration or prescribing of treatment therefor. (*O'Neil v. State*, 115 Tenn. 427, 90 S.W. 627, text 631; *State v. Mylod*, 20 R.I. 632, 40 A. 753, text 755; *State v. Hefferman*, 28 R.I. 20, 65 A. 284, text 287). In *People v. Powella*, 176 Ill. App., 603, a woman represented herself to be a *specialist on diseases of the feet, applied salve and medicated cotton to an ankle and bandaged it, and gave advice as to the care of the said ankle. This was held to constitute the practice of medicine.* The term "physician" is used in two senses, in its narrow sense it means one proficient in the art of healing by means of the application of physic or medicine, and in its broader sense it means anyone who practices the art of preserving health and healing disease, and who prescribes remedies for disease and sickness. (25 Fla. Jur. 83, §2).

"At common law, any person was permitted, without let or hindrance, to apply palliative and mechanical treatment for deformities and functional disturbances of the feet." (*People v. Dr. Scholl's Foot Comfort Shop, Inc.*, 277 N.Y. 151, 13 N.E. 2d 750, text 752). Although the laws of Florida required occupational licenses of physicians prior to 1881, Ch. 3296, 1881, appears to have been the first act requiring the examination and licensing of physicians in this state. This chapter was superseded by Ch. 3881, 1889, which provided for the first state-wide medical board charged with supervision of "*the practice of medicine in any of its branches or departments,*" within the state. This act became §§ 801-812, Revised Statutes of 1892. Said sections 801-812 provided for two medical boards, referred to as a state board of medical examiners and a state board of homeopathic medical examiners. Chapter 4698, 1899, which became §§1157-1159, General Statutes of 1906, provided for a state board of eclectic medical examiners. The medical statutes of the state were revised, consolidated and re-enacted by Ch. 8415, 1921, creating a 10 member state board of medical examiners; five allopath physicians, three eclectic physicians and two homeopathic physicians. These statutes required that every person practicing medicine in this state, in any of its branches, be possessed of a medical license issued by the board so created or a prior board. Under these statutes doubtless any treatment of human feet in this state, *other than the application of palliative and mechanical treatment for deformities and functional disturbances of the feet*, would have been deemed the practice of medicine within the purview of said statutes.

The legislature, by Ch. 12197, 1927, created a board of podiatry or chiropody, requiring the examination, qualification and licensing of podiatrist or chiropodist, defining the practice of chiropody as the diagnosis, *medical*, surgical, palliative and mechanical treatments of ailments of the human foot or leg, except the amputation thereof. Such practitioners *were not* by said statute authorized to use and prescribe local anesthetics. This law which appears

to have been superseded by Ch. 15911, 1933, revised and re-established the laws relating to chiropody, under which 1933 act chiropody was defined as "the diagnosis, *medical, surgical, palliative* and mechanical treatment of ailments of the human foot and leg, except the amputation thereof; and *shall include* the use and prescription of local anesthetics." These powers are far beyond the application of "palliative and mechanical treatment of deformities and functional disturbances of the feet," described in *People v. Dr. Scholl's Foot Comfort Shop, Inc.*, supra, as being the common law powers of persons generally.

The statutes regulating physicians (Ch. 458), osteopaths (Ch. 459), chiropractic (Ch. 460), *chiropody* (Ch. 461), and dentistry (Ch. 466), appear to cover the field of *medical practice in this state*. These chapters constitute one overall regulation. Should they all, except Ch. 458 relating to the regulation of physicians, be repealed, there is reasonable reason to believe that all such branches or schools would come under the regulation of said Ch. 458. This leads to the conclusion that the terms "*medical*" and "*surgical*," and maybe "*diagnosis*," as used in the definition of chiropody contained in §461.01, F. S., move into the medical field, so that any reference in an insurance policy to a licensed or qualified physician, doctor or surgeon, without some specific limitation to a particular school of medicine, clearly extends to *chiropody*, insofar as the examination or treatment of the foot extends to its diagnosis for disease or injury, and medical or surgical treatment.

In addition, it is significant that the legislature has defined chiropody as the diagnosis, *medical, surgical, palliative* and mechanical treatment of ailments of the human foot or leg, *except the amputation thereof*; and shall include the use and prescription of local anesthetics. (§461.01, F. S.)

Also, persons professing to be chiropodists or practicing chiropody in this state are first required to obtain a license from the state board of chiropody examiners as a condition precedent to engage in such profession. Applicants therefor are required to be possessed of certain qualifications and to pass an examination in the field of chiropody given by the board. The applicant is examined upon studies of anatomy, chemistry, dermatology and most material to your inquiry, *the subject of materia medica, pathology, physiology, surgery and clinical or orthopedic podiatry, limited in scope to the treatment of the foot and leg* (§461.03, F. S.).

Regulatory law pertaining to the practice of chiropody, Ch. 461, does not apply to other licensed practitioners in the state whose governing statutes permit them to also treat the foot and leg; nor does it apply to medical practitioners of the army, navy and public health service when in actual performance of official duties (§461.04, F. S.).

Under §458.13 (1), F. S., any person is deemed to be practicing medicine within the purview of the medical practice act who holds himself out as being able to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition, or who shall offer to undertake, by any means or method, to diagnose, treat, operate or prescribe for any human disease, pain, injury, deformity or physical condition.

Subsection (2) of said section specifically exempts from regulation under the medical practice act, Ch. 458, F. S., chiropodists and other persons licensed by respective state boards when prac-

ting a profession within the purview of the statutes applicable to their particular professions.

While I do not believe a chiropodist would come within a contract provision defining a physician as "doctor of medicine" or designating a physician as an "M.D." or as one licensed to perform all surgery, or otherwise limited, in view of the above cited statutes and authorities I am of the opinion that one engaged in the practice of chiropody is engaged in the practice of medicine limited by Ch. 461 to such practice in the treatment of disease or injury to the human foot and leg, and that a person licensed to practice chiropody falls within the provisions of disability contracts defining "physician" as one licensed to practice medicine.

062-41—March 5, 1962

COUNTY SCHOOL SYSTEM

CONSTRUCTION OF SCHOOL BUILDING, PINELLAS COUNTY, SUBJECT TO STATE SCHOOL CONSTRUCTION CODE—§235.25, F. S.

To: *Thomas D. Bailey, State Superintendent of Public Instruction, Tallahassee*

QUESTION:

Is the Pinellas county board of public instruction required to secure building permits for construction of public school buildings from the county building department and to pay the fees therefor?

In AGO 058-119 we stated that the Florida legislature has provided in §235.25, F. S., a "comprehensive, detailed program for school construction and the establishment of desired standards . . ." and that "when the state has established its own building code for school buildings, I do not believe that a municipality has legal authority to interfere by ordinance *unless the city's charter specifically grants it such authority.*" (Emphasis supplied.)

In my opinion the same rule would apply to county building departments, for the same reasons set forth in AGO 058-119 *unless the legislature had granted specific authority to such county building departments* to superimpose their own building code over that provided by the legislature on a state-wide basis for public schools.

Subject to the above observations, your question is answered in the negative.

062-42—March 5, 1962

COUNTY SCHOOL SYSTEM

OFFICES AND MEETINGS OF COUNTY BOARD OF PUBLIC INSTRUCTION, LOCATION—EXPENSE OF CONSTRUCTION OF OFFICES—§§230.29, 230.17, F. S.; §4, ART. XVI, STATE CONST.

To: *Thomas D. Bailey, State Superintendent of Public Instruction, Tallahassee*

QUESTIONS:

1. **May a county superintendent's and school board's offices be outside the city limits of a county seat?**

2. **If question 1 is answered in the affirmative, may official school board meetings be held in these offices?**

3. May a board of county commissioners build or assist in building school board and superintendent's offices on land owned by a school board?

4. May a school board build, assist in building or make a major renovation of a building on land owned by a board of county commissioners?

Section 230.29, F. S. provides:

Office of county superintendent; where located; how maintained.—The county superintendent shall have his office at the county seat. Office space shall be provided and heat and light furnished by the board of county commissioners; provided, however, that in the event such office space as above required is not provided by the commissioners, the county board may provide such space as is needed. The office shall be provided with furniture, equipment, telephone, supplies, and other essentials by the county board.

Section 230.17, F. S., provides:

Place of meetings.—All regular and special meetings of the county board shall be held at the county seat and in the office of the county superintendent or in a room convenient to that office and regularly designated as the county board meeting room.

Section 4, Art. XVI, State Const., provides:

Location of county offices; residence of clerk and sheriff.—All county officers shall hold their respective offices, and keep their official books and records, at the county seats of their counties; and the clerk and sheriff shall either reside or have a sworn deputy within two miles of the county seat.

In the case of *Motes v. Putnam County*, 143 Fla. 134, 196 So. 465, the Florida supreme court held:

Under constitutional provision that county officers shall hold their offices and keep their official records at the county seats and under applicable statutes, it was intended that official meetings for transaction of business by boards of county commissioners and like boards should be publicly conducted at a known place in the county seat. (Emphasis supplied.)

In the case of *Beville v. State*, 61 Fla. 8, 55 So. 854, the Florida supreme court stated "A county seat or county town is the chief town of a county, where the county buildings and courts are located, and county business transacted."

In my opinion, based on the above cited authority, it is the intent of the Florida constitution, Florida statutes and the Florida supreme court that county school superintendents and school boards shall have their regular official offices located within the town or city limits of the county seat. This does not preclude the maintenance of administrative offices for school principals or other administrative personnel in places where necessary or convenient away from the county seat.

Subject to the above observations, question 1 is answered in the negative.

Question 2 is answered by the above.

Questions 3 and 4 have been answered, I believe, by AGO 061-89 in which I stated:

Because of the proviso in section 230.29, it does not appear that the legislature intended the obligation of the board of county commissioners to provide office facilities for the county school superintendent to be absolute. The statute in its most reasonable sense appears to authorize an expenditure of county funds, or in the alternative, an expenditure of county school funds to provide office space for the county school superintendent. It is my opinion that the board of county commissioners, if county funds are available, would, under this section, be authorized to contribute such funds to the construction of a county school superintendent's office facility.

It is my further opinion that the board of county commissioners and the board of public instruction could by agreement recognize such a contribution as being a discharge of any present obligation on the part of the county to furnish additional moneys for the operation of such project. However, there is serious doubt that such an agreement between the present board of county commissioners and board of public instruction could be considered binding as to future boards.

It is also my opinion that the operating expense of the office of county superintendent is to be borne by the county board of public instruction.

In other words, question 3 is answered in the affirmative and question 4 is answered in the affirmative subject to the observations quoted above from AGO 061-89, and provided that the expenditure of school funds for building construction on lands owned by the county commissioners is for the sole purpose of providing office space for use of county school officials.

Your attention is also directed to AGO 061-86 relating to the place where official meetings of a county school board are to be held.

062-43—March 9, 1962

TAXATION

DOCUMENTARY STAMPS—ASSUMPTION BY ONE PERSON OF OBLIGATION OF ANOTHER—§§201.08, 676.47, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

What is the measure of documentary stamp taxes payable, if any, on an agreement entered into by and between three parties whereunder a third party, with the consent of the mortgagee, assumes the obligation of the mortgagor, who is released from the said obligation by the mortgagee?

It appears from your file handed us with the request for opinion that the mortgagor in question was indebted to the mortgagee in the sum of \$13,200, upon the execution of the promissory note evidencing said sum, which note was secured by a mortgage encumbering real property, the mortgagor, evidently having sold and transferred the property so encumbered to a third party, entered into an agreement with the mortgagee and said purchaser, under which agreement such third party agreed to assume and pay

the said mortgage indebtedness, the mortgagee agreed to release the mortgagor from the said mortgage obligation, which arrangement was agreed to in writing by and between the said parties. The binding obligation existing between the mortgagor and the mortgagee was substituted by an agreement between the said mortgagee and the third person, under which the said third person assumed and agreed to pay the mortgage indebtedness.

In *Metropolis Pub. Co. v. Lee*, 126 Fla. 107, 170 So. 442, text 444, the court said that the 1931 act, now Ch. 201, F. S., including amendments, "was intended to create a selective tax applicable to a class of instruments recognized by the law merchant as particularly susceptible to the imposition of a documentary stamp tax." Here the court was of the view that the doctrine of *ejusdem generis* was applicable. In *Dundee Corp. v. Lee*, 156 Fla. 699, 24 So. 2d 234, text 235, the court remarked that "we think that the phrase 'written obligation to pay money' must comprehend the covenant in a lease to pay rent Since we hold that 'written obligations to pay money' contemplate the covenant in the lease to pay rent," and proceeded next to the consideration of the method of calculating the obligations of a lease. In *De Vore v. Lee*, 158 Fla. 608, 30 So. 2d 924, the court said that the statutes contemplate an outright obligation to pay money, not a mere contingent one. Section 201.08, specifically provides that "mortgages which incorporate certificates of indebtedness, not otherwise shown in separate instruments, are subject" to the tax imposed by said §201.08, F. S.

The use of the phrase "written obligation to pay money," in connection with the terms "promissory note" and "non-negotiable note," was doubtless designed to include obligations in addition to promissory notes and non-negotiable notes, although of the same nature as promissory notes and non-negotiable notes, another group of similar obligations. "The essential requisites of a promissory note are an unconditional promise to pay money, a fixed time for payment, and a definite amount to be paid" (7 Am. Jur. 795, §11, note 6). A negotiable note "is an unconditional promise in writing made by one person to another signed by the maker, engaging to pay on demand or at a fixed or determinable future time a sum certain in money to order or to bearer" (§676.47, F. S.). One of the main distinctions between negotiable and non-negotiable ones, is that the negotiable ones are payable without condition while the non-negotiable ones are made subject to a condition or upon a contingency which is not certain to happen.

The contract by and between the said three parties appears to be an unconditional promise in writing made by one person to another, signed by one of the makers, engaging to pay according to the terms of the original obligation, which evidently was an unconditional promise to pay money, at a fixed time for payment, in the sums specified, which was evidently within §676.47, F. S., relating to negotiable instruments. The obligation of the said third party was of the same nature, although not negotiable, as the promissory note or other obligation assumed and agreed to be paid.

We conclude that the above contract, entered into between the said three parties, contained a written obligation to pay money, by the said third party, within the purview of §201.08, F. S., taxable therein on the total amount thereby assumed, which we presume to have been the \$13,200 mentioned in said contract, less any payments made prior to the making of the said contract.

062-44—March 12, 1962

TAXATION

INTANGIBLE TAX—BONDS HELD BY FLORIDA CITIZENS,
ISSUED BY HOUSING AUTHORITY OF ANOTHER
STATE, INSURED UNDER NATIONAL HOUSING

LAW—§§199.02(5), 423.01-
423.03, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are bonds and debentures issued by public housing authorities of other states, and insured under the national housing law, as amended by public law 87-70, 1st session, 87th congress, held by citizens and residents of Florida, subject to Florida intangible tax?

There was attached to the request for opinion an advertisement appearing in the Wall Street Journal recently offering for sale bonds issued by the "new housing authority," of New York City, advising that interest on such bonds was exempt from federal and New York income taxes, there being no indication of exemption from ad valorem taxes, even of New York. There appears in the file also a reference to a similar housing authority of Boston, Mass. These bonds appear to have been issued by state or local, and not federal, agencies. They are not federal bonds.

Section 199.02(5), F. S., provides that "intangible personal property belonging to the state, or any political subdivision, and intangible personal property belonging to any religious, charitable, benevolent or educational association shall be exempt from taxation." We find no provision in the laws of Florida expressly exempting bonds issued by housing authorities of other states from ad valorem taxation in Florida. Section 423.03, F. S., when read in the light of §§423.01 and 423.02, F. S., and the legislation from which derived, clearly applies to debentures issued by housing authorities of Florida. Other states have no constitutional authority to provide for tax exemption for bonds and debentures issued under their authority when held by citizens and residents of other states. If the bonds and debentures mentioned in the above question are entitled to tax exemption when held by citizens and residents of Florida, such exemption must be granted by some valid federal legislation.

The above mentioned advertisement in the Wall Street Journal advertising new housing authority bonds or debentures only claims that interest on the bonds or debentures advertised, not on the principal, is exempt.

Section 1723a, title 12, U. S. code, provides tax exemption for the national housing authority, its franchise, capital, reserves, surplus, mortgages and income, by the federal, state and local governments; however, this exemption does not extend to bonds and debentures issued by state or local housing authorities, although insured by the national mortgage association. A similar tax exemption is granted the public housing administration under §1405, title 42, U. S. code. Sections 1410 and 1413, title 42, U. S. code, authorizes payments in lieu of taxes by local housing authorities; however, we find nothing in the federal statutes sufficient to exempt from taxation the bonds and debentures mentioned in the above question. We find nothing sufficient to take the bonds and debentures

tures mentioned in said question out of the purview of AGO 055-38, of Feb. 23, 1955 (1955-1956 AGO 52).

The above question is, therefore, answered in the affirmative.

062-45—March 27, 1962

TAXATION

TANGIBLE PERSONAL PROPERTY—SIGNBOARDS AND ADVERTISING STRUCTURES—CH. 200, §479.01, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are signboards and "advertising structures," as defined in §479.01, F. S., tangible personal property subject to taxation under Ch. 200, F. S.?

Tangible personal property, for purposes of taxation under Ch. 200, F. S., includes "all goods, chattels, boats, vessels, vehicles (except motor vehicles), animals and other articles of value capable of manual possession and whose chief value consists of the thing itself and not what it represents." The signboards and advertising structures herein contemplated are clearly tangible personal property, unless, because of their attachment to the land, they became a part of the realty to which attached. They were, prior to the time they were attached to the land, tangible personal property, whether in completed form or as lumber and material from which the signboard or advertising structure was constructed. A fixture has been defined as personal property or a chattel actually or constructively affixed either to the land or to some structure legally a part of the land (*Greenwald v. Graham*, 100 Fla. 818, 130 So. 608, text 610; *Commercial Finance Co. v. Brooksville Hotel Co.*, 98 Fla. 410, 123 So. 814, text 816).

Fences permanently affixed to the land have generally been deemed in law a part of the realty and belong to the owner of the land (22 Am. Jur. 521, §10; 36A C. J. S. 286, §15; 36A C. J. S. 620, §11). Signboards attached to store buildings have been considered as a part of the realty (36 C. J. S. 620, §11). In *Wood Preserving Corp. v. State Tax Comm.*, 235 Ala. 438, 179 So. 254, text 256, the Alabama court held that cross ties, piling, bridge timbers, telephone and telegraph poles and cross arms, when annexed to the land, "for the purposes for which suited, and for which manufactured and sold, become fixtures and part of the freehold."

"Even though there is no physical detachment of articles or structures affixed to realty, there may be a constructive severance by act or agreement of the parties. A constructive severance may be made by express agreement, and a severance may, it seems, be brought about by the treatment of articles annexed as personalty by persons interested therein, but acts or agreements failing to show mutual intent or treat the fixtures as personalty will not effectuate a constructive severance." (36A C. J. S. 668, §21; see also 14 Fla. Jur. 396, §9, and 22 Am. Jur. 727, §14).

In connection with the request for opinion, we have been furnished with an outdoor advertising lease form, used by one of the outdoor advertising firms of the state, which contains the provision that "it is expressly understood that all displays or equipment placed on the above described property by . . . (the lessee) . . .

is at all times the property of . . . (the lessee) . . . and subject to removal at any time." Provision is also made in such lease form for indemnifying the lessor for any damages resulting from the installation of signboards and advertising structures. These provisions clearly indicate an intention to sever the signboards and advertising structures from the realty and make them tangible personal property.

The above stated question is answered in the negative except as to those cases where there has been a constructive severance of the signboards and advertising structures from the realty thereby making them tangible personal property, in which case there would be an affirmative answer. In the absence of a constructive severance the signboards and advertising structures become part and parcel of the real property and are not tangible personal property; however, where there has been a constructive severance such signboards and advertising structures remain tangible personal property and are subject to taxation under Ch. 200, F. S.

062-46—March 27, 1962

TAXES

LICENSE TAXES—HOUSE TRAILERS AND MOBILE HOMES
—RENTAL TO TRANSIENTS—§§205.29, 509.251, 509.242,
212.03, 320.081; CH. 509, F. S.; §13, ART.
IX, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are persons renting house trailers or mobile homes to transients, or rooms therein, subject to the payment of occupational license taxes, when such trailers or mobile homes bear motor vehicles license tags issued under and pursuant to §320.081, F. S.?

Section 205.29, F. S., imposes an occupational license tax on persons engaged in the business of operating a boarding house, tourist camp, cabin camp, auto court or hotel having beds for 10 or more persons. This section seems to relate to the number of beds made available for rental, whether in one or more than one building or facility.

Section 509.251, F. S., imposes a license tax or fee upon persons, firms or corporations operating public lodging establishments, such license tax or fee depending upon the number of rooms made available for occupancy; the schedule of such license taxes or fees being set out in detail in §509.251 (1), F. S. Under §509.242, F. S., the operation of Ch. 509, F. S., extends to hotels, apartment houses, apartment motels, motels generally (including motor courts, motor hotels, motor lodges, tourist courts, etc.), fishing camps, resort and beach motels, rooming houses, guest houses, etc. Section 509.242 (1) (g) appears to have been a catchall designed to include any and all facilities maintained for transit rental.

Said §§509.242 and 509.251, F. S., seem to at least embrace the transient rentals taxed under §212.03, F. S., that is, the business of renting, leasing or letting of living quarters, or sleeping or housekeeping accommodations, in hotels, apartment houses, rooming houses, tourist and trailer camps and the like, to transients.

From the above and foregoing it seems evident that the above stated question should be answered in the affirmative unless entitled

to exemption under §13, Art. IX, State Const., which provides that "motor vehicles as *property*, shall be subject to only one form of taxation which shall be a license tax *for the operation of such motor vehicle*." Section 320.081, F. S., imposes a license tax of \$10 per annum per vehicle upon the owners and operators of house trailers, which appear to include mobile homes, within this state, and further provides that "this license tax shall be in lieu of all other taxes, and a suitable license plate shall be issued to evidence payment thereof." Construing §320.081, F. S., in the light of said §13, Art. IX, State Const., it seems clear that the license tax imposed by §320.081, F. S., is one for the operation of such trailers over the highways of Florida. This exemption does not extend to the licenses and fees imposed by §205.29 and §509.251, F. S., when such trailers or mobile homes as used for the operation of rental or temporary housing facilities.

The above stated question is answered in the affirmative.

062-47—March 30, 1962

DEPARTMENT OF PUBLIC SAFETY

PERSONNEL—CONDUCT OF CIVIL SERVICE HEARINGS—
APPOINTMENT OF EXAMINERS—§§321.01, 321.06,
120.011-120.331; CH. 120, F. S.

To: H. N. Kirkman, Director, Department of Public Safety,
Tallahassee

QUESTION:

Would the executive board of the department of public safety be authorized by Ch. 120, F. S. or otherwise to appoint an examiner for the purpose of taking testimony at hearings held pursuant to §321.06, F. S.?

Section 321.01, F. S., provides that the department of public safety shall be under the control and administration of an executive board composed of the members of the cabinet. Section 321.06, F. S., provides a method of reviewing the discharge, suspension and reduction in rank or pay of any member of the Florida highway patrol. Said section is set forth as follows:

321.06 *Civil service*.—The board is hereby empowered and directed to make *civil service rules governing the employment and tenure* of the members of the highway patrol.

All persons employed as said patrol officers shall be subject to said civil service rules and regulations, and any amendment thereto which may thereafter from time to time be adopted. The director may, for cause, discharge, suspend or reduce in rank or pay, any member of said highway patrol by presenting to such employee the reason or reasons therefor in writing, subject to the civil service rules and regulations of the department, *and subject to the review of the board, which shall serve as a court of inquiry in such cases and shall hear all complaints and defenses*, if requested by such employee. Its decision shall be final and conclusive. Such civil service rules or regulations shall be subject to the revision of the legislature in the event civil service rules adopted by the board are declared unlawful or unreasonable. (Emphasis supplied.) It should be noted that the executive board, in operating pur-

suant to said §321.06, supra, sits as a civil service board for the purposes described in said section. To this extent in adjudicating the rights, privileges, and immunities of employees of the Florida highway patrol, the executive board performs a quasi-judicial function (*Handlon v. Town of Belleville*, 4 N.J., 99, 104, 105, 71 A. 2d 624, 16 A.L.R. 2d 1118); and such board would be required, according to the judicial decisions, to observe certain minimum safeguards for parties affected when hearings are conducted pursuant to §321.06 as is hereinafter discussed.

In 1961, the legislature enacted Ch. 61-280 (§§120.011-120.331, F. S.), commonly referred to as the administrative procedure act. The said act is intended to establish a uniform procedure to be used by agencies in adopting rules and regulations and to establish minimum requirements for the adjudication of any party's legal rights, duties, privileges or immunities by state agencies (§§120.011 and 120.20, F. S.).

The word "agency" as defined by Ch. 120 is sufficiently broad so as to embrace the department of public safety (§§120.021(1) and 120.21(1)). It would appear, therefore, in view of the expressed intent of the legislature in enacting Ch. 120, F. S., as discussed above, that the provisions thereof should be construed in *pari materia* with §321.06, supra, and all other statutory provisions relating to the same subject matter embraced within Ch. 120 (*State v. Johnson*, 71 Fla. 363, 72 So. 477).

It should be noted that in the event of any conflict between the provisions of Ch. 120 and the provisions of other statutes relating to the same subject matter, the provisions of Ch. 120 would supersede such other statutes to the extent of any conflict (*Realty Bond & Share Co. v. Englar*, 104 Fla. 329, 143 So. 152; *Routh v. Richards*, 103 Fla. 753, 138 So. 69).

Of particular importance to the instant inquiry are the provisions of §120.24(1), which provide as follows:

(1) All hearings shall be presided over by the agency, or by a member of the agency, or by a hearing examiner supplied by the agency who shall be competent by reason of training or experience.

Construing §120.24(1) together with §321.06, it becomes apparent that the executive board of the department of public safety would be authorized to conduct hearings held under §321.06 by the use of a hearing examiner.

This conclusion is further predicated upon the numerous judicial and text authorities which recognize this method of conducting hearings as legally proper *irrespective* of any statutory authority. (See 73 C.J.S., Public Admin. Bodies and Procedure, §§57 and 135, pp. 380-382 and 460, respectively; 42 Am. Jur., Public Admin. Law, §§73 and 74, pp. 384-389; and *Tamiami Trail Tours v. Carter*, 80 So. 2d 322; *Florida Dry Cng. & Laundry Board v. Economy Cash & Carry Cleaners, Inc.*, 143 Fla. 859, 197 So. 550.) Further, this method is in keeping with my comments expressed in AGO 059-197 on a similarly related matter (1957-58 biennial report, p. 735).

In holding its hearings or in utilizing the hearing examiner method of conducting hearings, it is important to make the following observations: The agency (executive board) must officially call the hearing, designate the time and place for such hearing, give notice thereof, and in the case of a hearing examiner, designate

the person or persons before whom the hearing is to be held. (Florida Dry Cng. & Laundry Board v. Economy Cash & Carry Cleaners, Inc., supra.)

In this regard, the agency is required to adopt appropriate rules of procedure for notice and hearing (§120.23). The conduct and record of such hearing is set forth in §120.24, F. S.; and the hearing examiner's powers are contained in §120.25, F. S. All parties shall be afforded the right to participate in an agency proceeding as set forth in §120.26, F. S. The hearing examiner would make a recommended order to the agency, which order shall include findings of fact (§120.25(8)). However, it would be the agency that would be the *sole trier of the facts*; and it would be the agency that would render the final decision with respect to a hearing held before an examiner. See §§120.28 and 321.06, F. S.; *Tamiami Trail Tours v. Carter*, supra. *Rules and regulations with respect to the foregoing should be adopted in keeping with the legislative intent expressed in Ch. 120, F. S.*

In light of the above statements, your question is answered in the affirmative subject to the comments as hereinabove expressed. I hope that this information has been helpful.

062-48—April 2, 1962

PAROLE AND PROBATION

INTERSTATE COMPACT FOR SUPERVISION OF PROBATIONERS AND PAROLEES—RESIDENCE—RESPONSIBILITIES OF SENDING AND RECEIVING STATES—

§§949.07, 394.27, 919.11, 921.09, 922.07; CH. 917, F. S.

To: Francis R. Bridges, Jr., Commissioner, Florida Probation & Parole Commission, Tallahassee

QUESTIONS:

1. Do parolees or probationers who are received for supervision through the interstate compact gain residence in our state while being under supervision here?

2. Will it be the responsibility of the sending state to take care of any mental conditions that the person might acquire while being under supervision in this state?

AS TO QUESTION 1:

Subsection (1) of the interstate compact for supervision of probationers and parolees, §949.07, F. S., declares that a state which is a party to the compact may permit a person placed on probation to "reside" in any other state which is a party to the compact while on probation or parole if such person is in fact a "resident" of the receiving state, or if the receiving state consents to such person being sent there. Such "resident" is defined in the statute as "one who has been an actual inhabitant of such state continuously for more than one year prior to his coming to the sending state and has not resided within the sending state more than six continuous months immediately preceding the commission of the offense for which he has been convicted."

There is some confusion about the respective meanings of the words "residence" and "domicile." As used in some statutes, the term "residence" is synonymous with the word "domicile," but not in every instance. When accurately used they are not convertible terms. Residence simply indicates the place of abode, whether permanent or temporary, while domicile denotes permanent residence (11 Fla. Jur., Domicil and Residence, §5). For purposes of this

opinion we shall assume that "residence" as used in your request letter means permanent residence or domicile. It is domicile that is determinative of such rights as the right to vote.

The two essential elements necessary to the acquisition of a new domicile are (1) residence in the locality (2) coupled with an intention to make it one's home. There must be a concurrence of both fact and intent. Where a good faith intention is coupled with an actual removal from the former domicile evidenced by positive overt acts, then the change of residence is accomplished and becomes effective (11 Fla. Jur., Domicil and Residence, §11). Proof of the requisite intent must be clear and unequivocal (*Grywalski v. Grywalski*, Tex., 263 S.W. 2d 684, 687).

There is some question whether a prisoner or convict is capable of maintaining sufficient intent to acquire a new domicile. Generally, a person's domicile is not changed by his involuntary confinement in a penitentiary or prison, but in such case his former domicile remains (28 C.J.S., Domicile, 12 g (7)). In *Wendel v. Hoffman*, 24 F. Supp. 63, citing *Millett v. Pearson*, 143 Minn. 187, 173 N.W. 411, 5 A.L.R. 256, it was said that:

As a general rule of law persons under legal disability or restraint or persons in want of freedom are incapable of losing or gaining a residence by acts performed by them under the control of others. There must be an exercise of volition by persons free from restraint and capable of acting for themselves in order to acquire or lose a residence. A person imprisoned under operation of law does not thereby change his residence.

In *Sellers v. Bridges*, 153 Fla. 586, 15 So. 2d 293, the Florida supreme court stated that a parolee, although at large while on parole, is a prisoner no less than a prisoner physically confined. This statement was made for the purpose of showing that a parolee should be allowed to bring habeas corpus proceedings to secure his discharge from penal supervision. Probationers are similarly under the restraint and control of others, and they may test the legality of their detention by habeas corpus (*Ex parte Bosso*, Fla., 41 So. 2d 322).

We have found one case, *Marathon County v. Milwaukee County*, Wis., 79 N.W. 2d 233, dealing with the question of whether a probationer can acquire a new domicile. In that case a person named Davidson was placed on probation in Wausau, Marathon County, with the state department of public welfare. At that time he was domiciled in Wausau. Afterwards, with the permission of the department, he moved to Milwaukee, taking his family with him. Three years later, Davidson's children were committed to the state public school as neglected children. Milwaukee county was assessed for the care of the children as their county of residence. That county petitioned to be relieved of the charges, stating that Davidson's residence was still in Marathon county, since his removal to Milwaukee county while on probation could not be considered as voluntary. On appeal the Wisconsin supreme court held that Davidson had acquired a new settlement in Milwaukee county, stating:

There is no necessary inconsistency between probation, of itself, and the necessary volition to establish a new residence. To be sure, a man on probation is subject to some restrictions on what he may do without per-

mission; but he is by no means under the total restraints of imprisonment. Indeed, it is the essence of probation that he shall be free to go about his business as a self-supporting citizen, except in the particulars in which he is restrained by the terms of the probation and the authorized commands of the probation authorities.

* * *

Whatever restrictions may have been originally imposed with respect to residence, it further appears that Davidson "*received specific permission* from the state department of public welfare, division of probation and parole, to move to Milwaukee where he was to be placed under supervision shortly after his arrival in Milwaukee."

. . . any restriction in the original order of probation which might have prevented Davidson from establishing a new residence in Milwaukee was eliminated *pro tanto* by the permission granted him to move to that city. There is nothing in the record to suggest that he was ordered to Milwaukee against his will, and the inference from the words "permission" and "allowed" is that he went there voluntarily. Permission made him a free agent in that respect, and his voluntary and permitted act should be given normal legal significance. (Emphasis supplied.)

Under the interstate compact for supervision of probationers and parolees, a state may "permit" a probationer or parolee to reside in any other state which is a party to the compact. The compact itself thus indicates that choice is involved when a person is placed under supervision in a state other than that in which he was convicted, under its terms.

Under subsection (3) of the compact, §949.07, F. S., a sending state may retake a person on probation or parole from the corresponding receiving state at any time prior to the expiration of such person's period of supervision. Does the fact that a person under supervision in a receiving state under the compact lacks the ability to stay indefinitely preclude him from establishing a domicile there? This question seems to be answered in the negative by the following remarks in the *Marathon County v. Milwaukee county* case, *supra*:

Davidson's ability to acquire a new residence was not destroyed by the fact that he might be ordered back to Wausau or to prison should circumstances warrant. Establishment of a residence, while involving intent to make a home for an indefinite period, does not require either intent or ability to remain in the new residence for the rest of one's life or indeed for any particular length of time. Probably everyone, in establishing a residence, contemplates that in the future it may be necessary or desirable to abandon it and move elsewhere.

. . . So in the present case, Davidson's ability to establish a Milwaukee residence was not impaired by his presumed awareness that he might have to return to Wausau.

If a parolee or probationer received by Florida was legally domiciled in Florida at the time he was permitted to come to this state under the compact, he retains that domicile while under supervision here, in accordance with the C.J.S. rule set forth above. If a person under supervision in Florida as a receiving state under

the compact was not legally domiciled in Florida at the time of his conviction in the sending state he may, nevertheless, acquire a domicile here, but proof of his intent to establish the new domicile must be clear and unequivocal. These observations answer question 1.

AS TO QUESTION 2:

Section 394.27, F. S., states that no person shall be committed to or received as a patient for treatment in a Florida state hospital who has not been a "bona fide resident" of the state continuously for one year. The phrase "bona fide resident," as used in said statute has been construed in previous opinions of this office as meaning domicile (AGO 050-274, June 6, 1950, and 049-216, May 19, 1949). A parolee or probationer under supervision in Florida as a receiving state would not seem to be entitled to treatment in a state hospital in Florida unless he has qualified under said section by being domiciled in Florida, or unless he is committed under some other provision in the Florida Statutes, such as Ch. 917, or §919.11 or §921.09. Those laws provide for commitment of defendants in criminal prosecutions for reasons of insanity. In AGO 050-274, supra, we stated that the provisions of §394.27, F. S., are not applicable when a trial court in a criminal proceeding commits an acquitted defendant pursuant to §919.11. Although that opinion dealt only with §919.11, the reasoning underlying our finding therein is equally applicable with respect to Ch. 917 and §921.09.

We must conclude, on the basis of the above, that the residence requirements of §394.27, F. S., do not apply in instances in which a person is committed under Ch. 917 or §919.11 or §921.09, or, for that matter, under §922.07, F. S., which provides for commitment of insane persons under sentence of death. Under our statutes, this state, as receiving state under the interstate compact, would not seem to be authorized to take care of any mental conditions that a person might acquire while under supervision here unless such person (1) qualifies as a "bona fide resident" under §394.27, F. S., being domiciled in this state, or (2) is committed under Ch. 917 or §§919.11, 921.09 or 922.07, Florida Statutes.

Under §949.07 (3), F. S., a sending state may retake a person on probation or parole from a receiving state at any time prior to the expiration of such person's period of supervision. Since primary control over such person is, therefore, in the sending state, it appears that in cases not covered by Ch. 917, or §§394.27, 919.11, 921.09 or 922.07, F. S., it would be the responsibility of the sending state to care for mental conditions acquired by a person while under supervision in Florida as a receiving state. These observations answer question 2.

062-49—April 4, 1962

TAXATION—CORPORATIONS

CAPITAL STOCK TAX—FOREIGN CORPORATIONS, PAR AND
NON-PAR STOCK—§§608.33(2), (4) AND 613.02;

CH. 613, F. S.

To: Tom Adams, Secretary of State, Tallahassee

QUESTION:

What is the basis for determining the annual capital stock tax to be paid by foreign corporations authorized to do business in Florida under the following circumstances:

1. Where a foreign corporation authorized to issue par value stock only has filed an affidavit allocating a portion of capital to Florida which is less than its authorized and/or outstanding capital stock?

2. Where a foreign corporation which is authorized to issue par value stock only has filed an affidavit allocating a portion of capital to Florida which is more than its authorized or outstanding capital stock?

3. Where a foreign corporation issues no par stock only?

Section 608.33, F. S., requires every corporation doing business in Florida with few exceptions not applicable here to "pay to the state for the use of the state a capital stock tax" according to a schedule set out therein. Section 608.33 (2), F. S., leaves no doubt as to the applicability of this section to foreign corporations authorized to do business in Florida under the provisions of Ch. 613, F. S. Section 608.33 (4), F. S., establishes that no par stock shall be presumed to be worth \$100 per share unless this presumption can be overcome to the satisfaction of the secretary of state.

Section 613.02, F. S., permits foreign corporations to establish by affidavit the amount of stock allocated to Florida for the purpose of paying charter tax fees and this office is advised that annual capital stock taxes for foreign corporations are by rule or regulation likewise assessed on the basis of allocated capital. Such administrative rulings are persuasive here. See *L. B. Smith Aircraft Corp. v. Green*, Fla., 94 So. 2d 832.

A letter of Aug. 18, 1939, from the then secretary of state addressed to Prentice-Hall, Inc., contains the following statements concerning the payment of capital stock taxes and appears to have a further bearing on the conclusions to be reached herein.

(The) question of allocation of capital is purely arbitrary and therefore this office has never undertaken to promulgate an established policy dealing therewith. . . . For example, a foreign corporation which deals in real estate altogether within the state is in a position to submit a detailed statement showing its holdings within Florida which is the amount of capital in Florida. In the case of a manufacturer or wholesaler selling merchandise within state and having no visible assets, it will be necessary to measure business done in Florida with businesses done everywhere to get the percentage, and use of that percentage in multiplying paid-up capital will show amount of capital used in securing Florida business.

Since the law in question has not been basically altered since the writing of the letter quoted above and no additional regulations have been implemented since that time it would appear that these comments would be applicable to the instant situation until such time as more definitive regulations supplementing the law are adopted or until the law relating to foreign corporations is amended. Accordingly it would appear that your questions as set out above should be answered as follows:

1. A foreign corporation authorized to issue par value shares of stock only and which has allocated less than its authorized or outstanding capital stock to Florida would pay annual capital stock tax on that portion of its capital allocated to Florida according to the schedule contained in §608.33, F. S.

2. The capital stock tax on a foreign corporation authorized to issue par value shares of stock only which has filed an affidavit allocating capital to Florida which is more than the value of the authorized or outstanding capital stock would be figured on the same basis as the corporate stock tax considered in the answer to question 1 and according to the rules set out in AGO 050-292 in that the corporation would pay capital stock tax on the percentage of the outstanding capital stock equal to the percentage of capital employed in Florida, i.e., if half of the corporate capital were employed in Florida then a tax on 50% of the outstanding shares of stock should be paid to Florida unless the secretary of state desires to provide otherwise by appropriate rule or regulation.

3. The capital stock tax on a foreign corporation authorized to issue no par value shares of stock only which has filed an affidavit allocating capital to Florida would likewise be figured on the same basis as the corporate stock tax considered in question 1 in that the corporation would pay capital stock tax on the percentage of the outstanding capital stock equal to the percentage of the capital employed in Florida, i.e., if half the corporate capital were employed in Florida then a tax on 50% of the outstanding shares of no par stock valued at \$100 per share unless another value be established (see §608.33 (4), F. S.) should be paid to Florida unless the secretary of state desires to provide otherwise by appropriate rule or regulation.

I suggest that some more definitive amendments to these sections of the law might be in order and trust that these comments on an area of the law where arbitrary decisions have been the byword may be helpful.

062-50—April 4, 1962

LABOR UNIONS

SECONDARY BOYCOTT ATTEMPT AGAINST FLORIDA MUNICIPALITIES—§§447.09, 447.03, 542.01-542.12, 839.221, F. S.

To: *Robert King High, Mayor, City of Miami*

QUESTION:

Is a labor union legally authorized to attempt secondary boycott against Florida municipalities, to-wit: Miami and Miami Beach, nationally known resort centers, by asking its members and members of other unions throughout the nation as vacationers to stay away from said municipalities where it appears this union effort grows out of a labor dispute concerning the employment of persons to operate motor busses, which have been acquired by Dade county?

The labor dispute in question is explained in part by reference to litigation between parties mentioned above wherein the circuit court of Dade county on Jan. 4, 1962, entered a final decree in which, among other things, appeared the following:

3. Plaintiffs are not authorized by law to enter into a collective bargaining agreement with defendants and would not be authorized to do so upon consummation of the contractual transaction evidenced by the record in this cause.

4. Plaintiffs are not authorized to recognize as lawful any strike directed against them and would not be authorized to do so upon consummation of the contractual transaction evidenced by the record in this cause.

Subsequent thereto on Feb. 2, 1962, the court entered a supplemental order which provided in part as follows:

2. The defendants be and they are hereby enjoined and restrained from striking or continuing any strike for the purpose of coercing the plaintiffs or any other governmental agency to engage in collective bargaining.

The national labor relations board on March 2, 1962, reported the following:

We have concluded that in the present posture of the case the county is the employer of the employees who are or will be engaged in the operation of the transferred transit lines; that the statutory exemption in §2 (2) of the national labor relations act is applicable; and that the sale and purchase arrangements between Pawley and Dade county do not require a different conclusion.

A letter from Mr. William J. Owens, president, Dade county federation of labor is reported to have been sent to the 270 national presidents and secretaries of the A.F.L. & C.I.O. unions, to the 50 state labor federations and to 900 city and county federations in which the following appeared:

Trade unionists in Dade county the principal cities of which are Miami and Miami Beach *have invoked a boycott against the bus system.* We feel, however, that this is not far reaching enough that a county which so openly expresses its hatred for unions should not benefit from union workers hard earned money. We request therefore, that you ask the members of your affiliated groups:

Don't visit Miami and Miami Beach in Scab county, U.S.A. Please advise us to whatever action you take.

More than 60% of the economy of Dade county is dependent upon conventions, meetings and vacationers. Even though many of our members will be vitally affected by your staying away they will make the plea:

Don't visit Miami and Miami Beach in Scab County, U.S.A.

Bumper strips were reportedly sent to unions throughout the nation advocating a boycott of Dade county, Miami and Miami Beach.

Section 447.09, F. S., provides in part as follows:

It shall be unlawful for any person:

(1) To interfere with or prevent the right of franchise of any member of a labor organization. The right of franchise shall include the right of an employee to make complaint, file charges, give information or testimony concerning the violations of this chapter, or the petitioning to his union regarding any grievance he may have concerning his membership or employment, or the making known facts concerning such grievance or violations of law to any public officials, and his right of free petition, lawful assemblage and free speech.

(11) To coerce or intimidate any employee in the enjoyment of his legal rights, including those guaranteed

in §447.03, or to intimidate his family, picket his domicile or injure the person or property of such employee or his family. (Emphasis supplied.)

(12) To picket beyond the area of the industry within which a labor dispute arises.

(13) To engage in picketing by force and violence, or to picket in such a manner as to prevent ingress and egress to and from any premises, or to picket other than in a reasonable and peaceable manner.

Section 542.01 through 542.12, F. S., places restrictions upon monopolistic practices similar to those enacted by the federal government, 15 U.S.C. §§1 through 37. Labor unions generally are exempt from the anti-trust statutes, but have not been by statute exempt from the Florida law nor have there been cases in Florida recognizing their exemption.

Section 839.221, F. S., specifically prohibits state, county, and municipal employees from membership in any organization of governmental employees that strikes against the government or asserts the right to strike. Employees who abide by this restriction are assured of their right to membership in labor organizations. The circuit court's order specifically held the union to be exempt from this statute and therefore comes within the general rule as stated in *Miami Water Works Local No. 654 v. City of Miami*, 26 So. 2d, 194, to the effect that government employees do not have the right to strike, collectively bargain, picket, or boycott or use any other of the time-honored devices used by labor organizations to gain from the employer benefits for its membership. In construing this statute, this office in AGO 059-164 said:

... I further construe the act to recognize the basic premise that one cannot do *indirectly* what cannot be done directly. Therefore, the act prohibits government employee membership in any labor organization *which asserts against the governmental employer the right of secondary boycott, or which requires the employee to respect picket lines which affect his governmental employer; or which employs any other basic strike weapons against the public employer, or which uses union funds to support any strike weapon against such employer.* Nor does the Florida act authorize a public employee because of his union membership to directly or indirectly participate in any strike or boycott of his union against any private employer, or permit him to use his union membership as an excuse or justification for failing or refusing to provide any governmental service or to perform any governmental duty for any private employer.

Third parties are not authorized to instigate a boycott or strike (31 Am. Jur., p. 724).

Although there are no cases in Florida directly in point, there are numerous cases from other jurisdictions (See treatise on labor law by Forkosch.) The Florida courts have in dicta alluded to the problem. In the case of *Paramount Enterprises v. Mitchell*, (Fla.) 140 So. 328, the court stated its views on *secondary actions* and held that when the coercion extended to customers of the person or persons boycotted and attempts to coerce them on pain of being boycotted themselves unless they refrained from dealing with persons boycotted constituted a "secondary boycott."

Section 8(b) of the Taft-Hartley act is specific in its definition of unfair labor practices by way of secondary action.

A majority of the courts in this country have declared secondary boycotts to be unlawful (31 Am. Jur. 770 and 771). This is true even though the notices of the boycott are not accompanied by union violence or threats of violence. Florida appears to follow the general rule (20 Fla. Jur. 271). In the case of *Local Union No. 519 v. Robertson*, 44 So. 2d 899, the court held that picketing for the sole purpose of compelling plaintiff to enter into a closed shop agreement with the union was for an unlawful purpose and therefore the injunction granted by the lower court against this activity was upheld. The court specifically held that even peaceful picketing was not beyond the legislative control and was legal only to the extent that its purposes are within the allowable ambit of *legitimate labor activities*. In this conclusion the court said, text 904:

The avowed immediate objective by the picketing of the union was to compel the employer to enter into a closed shop contract obligating him to pursue a course of conduct at variance with the settled public policy of the state and one which would subject him to criminal and civil penalties. We hold that under the facts of the case, the picketing was in pursuance of an unlawful objective, and hence was enjoined. (Emphasis supplied.)

(See also: 31 Am. Jur., p. 774).

The above decision is directly in point to the facts reported herein. The boycott or attempted boycott has as its avowed purpose the compelling of the governmental employer, Dade county, to enter into collective bargaining with the defendant labor union which under the circuit court's order previously referred to, would be prohibited.

The union's letter specifically recognizes that members of its organization as well as others having no part in the controversy will be damaged by its action. It is this element of damage to innocent third parties that forms the basis for the general prohibition against secondary boycotts and secondary action generally.

The publication and distribution of circulars, letters, and other printed matter for the purpose of rendering a boycott effective is unlawful where the object sought to be attained by means of a boycott is unlawful, as where a secondary boycott condemned by law is attempted or where the boycott constitutes an unlawful combination in restraint of trade (31 Am. Jur., p. 781, par. 482).

The action complained of if taken subsequent to the injunction might be held to constitute contempt of the court's order. It is clear in my judgment that the action is in furtherance of what has been declared by the courts to be unlawful purpose and therefore enjoined under *Local Union No. 519 v. Robertson*, supra. If a labor union could legally enforce its objective either directly or indirectly by a nationwide program of economic boycott of certain cities, counties or states the result could be chaotic and anarchistic.

In our previous opinion above referred to this office set out in detail the things which public employees could and could not do under the statutes:

... we must conclude that in Florida public employees enjoy the right to join or to participate in union activi-

ties so long as the union does not, either directly or *indirectly*, strike, picket, or seek to enforce collective bargaining, or the right to a closed shop or a closed union or assert the right to strike, picket or bargain collectively, but restricts itself to the representation of its members in the present action of petitions and grievances connected with employment.

Third parties have no authority under our law to instigate a strike or boycott against the state or a county or city. The law of our state in this regard has been enunciated by decisions of the Florida supreme court and is supported by the great weight of authority. We believe any effort, direct or indirect, to visit economic reprisals against a governmental unit of our state and citizens residing therein to compel collective bargaining in behalf of public employees is illegal and outside the legitimate objectives of a labor organization.

It has been the policy of this office during my tenure to avoid becoming involved in controversies between labor and management since these are private controversies and should be handled by the parties without undue interference from government, except where the statutes clearly require governmental intervention. But the matter presently before me is different in that units of the Florida government itself are involved and I deem it my duty to entertain the question and to express the opinion that your question should be answered in the negative.

062-51—April 4, 1962

TAXATION

LICENSES AND LICENSE TAXES—HANDWRITING ANALYTICAL UNIVAC MACHINES—§§205.01, 205.21, 205.322, 205.49, 205.53, 205.60, 205.41, 205.411, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Are self-operating univac handwriting analysis machines, which operate electronically, subject to a license tax when operated in this state, and if so, under which section of the statutes?

These machines are operated by a corporation doing business in this state, their operation being set in motion when the handwriting of a person, written on a tabulator card furnished by the owner or operator of the machine and placed in the electronic machine, referred to as "authentic handwriting analysis, Remington Rand univac, handwriting analysis electronical" machine, or similar terms, is run through such machine. We have before us a card bearing the handwriting of a person which was placed in such a machine and processed, resulting in the delivery by the machine of seven cards analyzing such handwriting as to the writer thereof, to wit: "Writing shows analytical and critical mind"; "you make decisions quickly and firmly"; "you seldom wait for things to happen"; "you enjoy much activity mental and physical"; "you do more for others than for yourself"; "you tend to have a friendly disposition"; and "strong ability shown in your writing." Whatever analysis is made is made by the machine and not the owner or operator of the machine, so far as we are now advised.

Under §205.01, F. S., "no person shall engage in or manage any business, profession or occupation, for which an occupational

license tax is required by this chapter or other law of the state, unless" the required licenses be obtained and license taxes paid. The term "person" as used above "shall be construed to mean either person, firm, partnership, corporation, association, executor, administrator, trustee or other legal entity." So far as we are advised, the machine in question is not coin-operated. The machine, not itself being a *person* as above defined, it is doubtless the *business* of the person owning or operating it. Possible classification of the business in question includes the operation of an amusement device (§205.21, F. S.), an amusement enterprise (§205.322), a miscellaneous business (§205.49), a public service device (§205.53), or a traveling show or place of amusement (§205.60).

We entertain doubt that "every fortune teller, clairvoyant, palmist, astrologer, phrenologist, character reader or mental healer, spirit medium, absent treatment healer, or mental healer, and every person engaged in any occupation of a similar nature," as contained in §205.41, F. S., was intended to relate to machines of the nature here considered. A machine instead of a person does not seem to meet the provisions of §205.411, F. S. Although the owner or manager of the machine operates or manages the same, he does not, so far as this record is concerned, actually make the reading for and place them upon the machine; the machine by the use of electronic devices makes the reading from information stored therein by persons other than the owner or operator thereof. Our opinion 061-186, dated Dec. 1, 1961, dealt with a person making the reading through the use of a machine, not to a machine making readings independent of its owner or operator and his mental processes, as is here involved. We do not think that §§205.41 and 205.411, or either of them, have any application to the machines here considered.

We doubt that the machine here in question renders any public service as contemplated by §205.53, F. S. as public service as used in said section seems to contemplate something more than the use of the machine here in question. We also doubt the operation of §§205.322 and 205.60, F. S., to the machine here in question, in that it does not have any resemblance to a traveling show, exhibition or amusement enterprise. Section 205.49, F. S. imposes a license tax upon "every person engaged in the operation of any business of such nature that no license can be properly required of it under any other provision of this chapter, or other law of the state." This section is sufficiently broad to extend to the business of operating the machine described in the above question; and finding no other applicable statute or law, §205.49 appears to be the applicable statute.

The above observations answer the question in the affirmative, making the machines taxable under §205.49, F.S.

062-52—April 9, 1962

ABANDONED PROPERTY

PROPERTY IN HANDS OF PERSONAL REPRESENTATIVE—
PROBATE PROCEEDINGS DORMANT FOR 15-YEAR
PERIOD—CHS. 717 AND 716, §§717.09, 717.10,
14.07-14.13, 69.07, 69.16, 54.04-54.06, 550.164,
731.28, 731.33, 965.08(4), F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Are funds in the hands of personal representatives

appointed by probate and other courts of this state, where no action in connection therewith has been had in such courts within a period of 15 years last past, within the purview of Ch. 717, F. S., and considered as unclaimed or abandoned funds?

Chapter 717, F. S. (Ch. 61-10), makes provision for the disposition of certain abandoned property having a situs within the jurisdiction of Florida (see *Western Union Tel. Co. v. Penn. U.S.*, 82 S. Ct. , 7L. ed. 139), held by persons, firms and corporations within and without this state. This statute relates primarily to legal tender and intangible personal property within the hands of or due to persons within this state. A reading of said Ch. 717, F. S., and especially §717.10 thereof, clearly shows an intention to include therein all types moneys and intangible personal property having its situs within this state. Section 717.09, F. S., provides that "all intangible personal property held for the owner by any court, public corporation, public authority or public officer of this state, or a political subdivision thereof, that has remained unclaimed by the owner for more than fifteen years is presumed abandoned." The personal representative appointed by a probate court to administer the property of a decedent and make distribution thereof is an officer or agent of the court appointing him and holds the property in his hands subject of the jurisdiction of such court.

We are here concerned primarily with small sums of money or of intangible personal property in the hands of personal representatives, or on deposit in banks or other institutions in the name of such personal representative or the estate of the decedent or ward, which have remained in the hands of such personal representative, or on deposit in such bank or other institution, without any action having been taken in such estate by the personal representative of the court within a period of 15 years last past. In the light of Ch. 717, F. S., it seems clear that property, within the purview of Ch. 717, is to be presumed abandoned when it has remained in the hands of the personal representative, or on deposit by him in some bank or other institution, for a period of 15 years without any action having been taken in connection therewith by either the representative or the bank or other institution, or both. Courts as mentioned in §717.09, F. S., include the probate courts of this state, and their agents and representatives.

Chapter 717, F. S., is not an escheat statute but a possessory one which permits the lawful owner of the property coming into the possession of the state thereunder to claim his property, and at the present time there is no time limitation within which such a claim must be made. Although a decedent's estate probate proceedings may be closed if any of the estate property remains after the closing of the probate proceedings in the hands of any one unclaimed for a period of 15 years, it would be within the purview of said Ch. 717 and the state would be entitled to possession thereof, subject to the subsequent claim of the person entitled thereto. However, it would seem that the state while in possession of the said property would be entitled to any interest earned thereon while in the hands of the state. No charges are made by the state against the funds coming into its hands under said Ch. 717.

Section 30, Ch. 61-10, purports to repeal §§14.07-14.13, 69.07 and 69.16, F. S.; however, it is noted that no mention of such repeal

is mentioned in the title to said Ch. 61-10. The same section declares Ch. 717, F. S., to be additional and supplemental to §§54.04-54.06, 550.164, 731.28, 731.33, 965.08(4) and Ch. 716, F. S., thereby leaving said statutes in force and effect except to the extent they may conflict with said Ch. 717, F. S. Although a probate court may have jurisdiction to reopen a probate case that has laid dormant for many years and make disposition of the funds mentioned in the above question, when no such action is justified under the circumstances, or is for any other reason not taken, such sums are within said Ch. 717, F. S., and possession thereof may be taken under said Ch. 717. Even though possession passes to the state under Ch. 717, the state's rights thereunder are possessory so that the fund will not be lost to the person entitled to possession thereof, who may recover same upon proper proof of right to possession.

The above question is answered in the affirmative, subject to the last above observations concerning the possession of the state under Ch. 717, F. S.

062-53—April 13, 1962

LIBERTY COUNTY PORT AUTHORITY

AUTHORITY TO PURCHASE FIRE TRUCK FOR COUNTY USE
CHS. 30946, 1955; 31473, 31474, 1956; 57-1023, 57-1533, 59-1506,
61-2426, LAWS OF FLORIDA

To: *R. L. Hosford, Representative, Liberty County, Hosford*

QUESTION:

Does the Liberty county port authority have the legal authority to purchase a fire truck for countywide use?

It appears that the Liberty county port authority was originally created by Ch. 30946, 1955. The said 1955 act provided, among other things, for the port authority to be governed by a board of port commissioners, composed of the board of county commissioners.

Section 3 provided the rights, duties and authority of the port authority; §4 provided a severability clause; and §5 appropriated from the additional race track moneys to be distributed to Liberty county by §550.16, F. S., the sum of \$15,000 to the aforesaid port authority to carry out the purposes of the act.

Chapter 30946, §3(a) and (b), *supra*, relating to the duties of the said port authority were amended by Chs. 31473 and 31474 enacted at the 1956 extraordinary session of the legislature to provide for the Liberty county port authority to consist of three members to be appointed by the governor, and provided, in subsection 3(a), the port authority with the right to acquire by purchase or any manner all property, real or personal, desirable or convenient for the purpose of this act. The provisions in subsection 3(b), relating to the authority of the port authorities, are too numerous to list here, but it might be pointed out that they include, among other things, the operation of the following: airfields, radio broadcasting stations, electric power and water systems, sewage disposal, hospitals, school buildings, streets, sidewalks, pre-cooling and cold storage plants, shipping facilities via land, water or air, and all kinds of business enterprises deemed necessary and expedient by the port authority

to promote the port improvement and other improvements in Liberty county set forth in said subsection 3 (b).

Chapter 31474, 1956, amended §3(h) of the original act, Ch. 30946, *supra*, by providing the Liberty county port authority with the right, authority and duty to borrow money and to issue negotiable revenue bonds or certificates in the manner therein authorized and provided for doing the things provided in sections 3(a) and 3(b) of Ch. 31473, *supra*.

Chapter 57-1023, relating to the distribution of race track funds for Liberty county provides in §1(5), for \$5,000 to the Liberty county port authority.

Chapter 57-1533 amended §§2 and 3 of Ch. 30946, *supra*, to provide, among other things, for the membership of the Liberty county port authority to be increased from three to five members to be appointed by the governor; fixed the compensation and made certain amendments relative to the duties and powers of the said authority, none of which specifically refer to the subject of your inquiry.

Chapter 59-1506 *abolished* the Liberty county port authority as created by §2, 57-1533, *supra*, and provided that the Liberty county port authority shall be governed by a board of port commissioners which shall be the board of county commissioners of said county. It also repealed §3, Ch. 57-1533, relating to the powers and duties of the Liberty county port authority.

Chapter 61-2426 was enacted by the 1961 legislature which amended §2 of the original Ch. 30946 by again providing for the Liberty county port authority to be governed by a board of port commissioners of five members. Inasmuch as the powers and duties of the port authority for Liberty county as provided in §3 (a) and (b) of the original act had been abolished by Ch. 59-1506, *supra*, only the powers and duties contained in § 3(c)-(k), Ch. 30946, remain.

Inasmuch as fire departments and fire trucks are usually owned and operated by a municipality, your attention is called to paragraph (j) which provides as follows:

"To acquire, do and perform all things herein numerated separately or jointly or in conjunction with a municipality or other political subdivision of the state whether the same be within or without the territorial limits of Liberty county." (Emphasis supplied.)

Paragraph (g) provides, among other things, as follows:

... This power shall be full and complete in all respects whatsoever in order to promote, construct, accomplish, maintain and operate any of the public purposes or projects herein numerated or anything incidental or necessary to same. (Emphasis supplied.)

In view of the foregoing, if the purchase of a fire truck is considered by the Liberty county port authority to be *necessary or incidental* to carrying out any of the duties and functions enumerated in said subsection 3(c) through (k), *supra*, your question may be answered in the affirmative.

062-54—April 18, 1962

LEGISLATURE

POWER OVER CONSTITUTIONAL AMENDMENTS ADOPTED BY PRIOR LEGISLATIVE SESSION—SENATE JOINT RESOLUTION 216, 1961, AMENDING ART. VII, STATE CONST.; §2, ART. III, §§1, 3, ART. XVII, STATE CONST.

To: *Scott Kelly, Senator, Lakeland*

QUESTION:

May a joint resolution of the Florida legislature proposing a constitutional amendment and submitting the same to the next general state election, be amended or revised by any intervening extraordinary session of the said legislature and resubmitted at the said next general election?

No amendments to the Florida constitution were permitted to be proposed by other than at general sessions of the Florida legislature, under §1, Art. XVII, State Const., until the 1948 amendment thereof. Section 3, Art. XVII was not adopted until the general election of 1942; it provides for the submission of emergency amendments at either general or extraordinary sessions of the legislature. Under the 1948 amendment of said §1, Art. XVII, State Const., amendments to the Florida constitution may be proposed at any regular session, "or at any special or extraordinary session thereof called for such purpose either in the governor's original call or any amendment thereof." The quoted language of the constitution seems to pose some question as to the right of the legislature at a special or extraordinary session to take up and consider questions of amendments to the Florida constitution unless such be one of the purposes expressly mentioned in the governor's call or some amendment thereof. Where an extraordinary or special session is convened without the intervention of the governor, as provided in the proviso in §2, Art. III, State Const., "the legislature shall convene in extra session *for all purposes* as if convened in regular session." (Emphasis supplied.)

From the foregoing it is clear that any extraordinary session of the Florida legislature, whether called by the governor (when expressly included in the call) or by the members of the legislature themselves, may consider and submit amendments to the Florida constitution. The request for opinion poses the question of the power of the legislature in extraordinary session to "rescind the constitutional amendment concerning reapportionment . . . and in lieu thereof submit a more equitable reapportionment amendment." The proposed amendment referred to is the one submitted by S. J. R. 216, by the 1961 Florida legislature at its 1961 regular session, submitting a proposed revised Art. VII, State Const.

The 1955 regular session of the Florida legislature, by a committee substitute for H. J. R. 810, proposed a revision and amendment of Art. V, State Const., and submitted the same to the general election in 1956 for approval or rejection. However, the said legislature was called into extraordinary session, which began July 23, 1956, and ended on Aug. 1, 1956, at which extraordinary session H. J. R. 83-XX was introduced, considered and adopted, and submitted to the said general election in 1956, and which resolution proposed an amendment of §10 of the amendment proposed by the said regu-

lar session of the Florida legislature. We have examined the ballot used at the general election in 1956 and find that the two house joint resolutions were submitted separately on the ballot as if separate amendments, and separately voted on. In other words, the 1955 proposed Art. V included a §10, was submitted as one proposed amendment, and the proposed amendment, also designated as an amendment of §10 of said Art. V, of 1956, was also submitted as another amendment. We doubt that it is necessary for us to become involved with the question of the power and authority of the legislature at an extraordinary or special session, held between a regular session and the next general election, to amend a joint resolution submitted at the regular session proposing the amendment of a specified section and article of the Florida constitution. The same purpose may be accomplished by another original proposal, proposing another amendment of the proposed section or article.

For example, S. J. R. 216, of the 1961 regular session of the Florida legislature, proposing an amendment or revision of Art. VII, State Const., to be submitted to the general election in 1962, would not seem to prevent any extraordinary session held in 1962, in sufficient time for submission of a proposed amendment, from also proposing a proposed amendment of all, or any part of, the said Art. VII, following the procedure followed above as to the 1956 amendment of Art. V., State Const. and §10 thereof. Should any such amendment be proposed at such an extraordinary or special session, provision should be made in the subsequent proposed amendment repealing the earlier one should both proposals be adopted at the same general election.

In *Jenkins v. Entzminger*, 102 Fla. 167, 135 So. 785, text 791, the court stated that "the legislature has power to reconsider its action even on a constitutional amendment," and may provide rules of procedure for considering joint resolutions proposing constitutional amendments (*Crawford v. Gilchrist*, 64 Fla. 41, 59 So. 963, text 968). In this case the right of the legislature to reconsider its action, at the same legislative session, was upheld. In *Opinion of Justices, Ala.*, 39 So. 665, text 668, the supreme court of Alabama advised that "we know of no reason why the legislature, while still in session, could not" recall from the office of the secretary of state a joint resolution proposing a constitutional amendment theretofore duly adopted.

In *Advisory Opinion*, 137 Colo. 49, 328 P. 2d 103, the court advised that a constitutional amendment proposed at a regular session of the legislature may be amended at an extraordinary session held prior to the election at which the amendment was to be submitted. No authorities were cited by the court in support of its position. In *Clements v. Powell*, 155 Ga. 278, 116 S. E. 624, a proposed constitutional amendment submitted by the 1919 general assembly to be voted on at the general election in 1920, was amended at the 1920 session of the general assembly, prior to the 1920 general election; an application to enjoin the submission of the proposed amendment as amended was denied. On appeal the action of the lower court was upheld. We find no other authorities on the exact question.

Although we feel that this procedure is a valid one, we cannot say that it is not without doubt, in that we have been able to find only two cases directly in point. We feel that the sure practice would be to follow the practice followed at the 1956 extraordinary session

of correcting §10, Art. V, as proposed at the regular session in 1955, above mentioned and discussed.

062-55—April 18, 1962

TAXATION

INTANGIBLE PERSONAL PROPERTY TAXES—SHARES IN TRUST—SECURITIES—CHS. 199, 192-194, 201, 609; §§199.02(2), 201.02, 201.04, 201.05, 201.07, 201.08, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. Are shares or other evidence of beneficial interest in property held in trust, issued by the trustee or the trustor, intangible personal property subject to taxation under Ch. 199, F.S.?

2. Are obligations issued by a business trust, secured by lien on trust property or unsecured, intangible personal property subject to taxation under Ch. 199, F.S.?

3. Are shares or other evidence of beneficial interest in property held in trust, issued by the trustee or trustor, subject to documentary stamp taxes in this state?

4. Are obligations issued by a business trust, secured by lien on trust property or unsecured, subject to documentary stamp taxes in this state?

The prospectus of one of the real estate trusts under consideration here appears to divide the beneficial interests thereunder into 2,500,000 shares of beneficial interest, in a trust consisting primarily of real properties, including office buildings, professional buildings, industrial buildings, warehouses, apartment buildings, motels, and other types of real property. Under this prospectus, it is indicated that such shares of beneficial interest may be sold either for cash or real property of a similar nature to that above mentioned. There is also indication in the prospectus that such shares of beneficial interest or the proceeds from the sale thereof may also be used in the purchase of obligations secured by mortgages or other liens upon real estate. The real estate and other property of the trust having a situs in Florida would appear to be subject to ad valorem taxes in this state, the real property under Chs. 192-194, F. S., and the obligations secured by mortgage or lien under Ch. 199, F. S., unless entitled to exemption under the Florida constitution, or some Florida statute.

"In its technical sense, a trust has been defined as the right, enforceable solely in equity, to the beneficial enjoyment of property, the legal title to which is vested in another." (89 C. J. S. 712, §2). Also, "the legal relationship between one person having an equitable ownership in the property and another person owning the legal title to the property." (33 Fla. Jur. 7, §2). "A discerning and terse definition is that a trust is the separation of the same estate into two parts, legal and equitable." (54 Am. Jur. 21 and 22, §4). The trustee owns the legal title to the property and the beneficiaries or cestuis que trustent own the equitable title to said property. In law the property is owned by the trustee, while in equity it is owned by the cestuis que trustent. In *Columbia Bank for Coop. v. Okeelanta Sugar Coop.*, Fla., 52 So. 2d 670, text 675, the court said that "an assignment of an interest in a trust is a transfer of right, title and interest in property; it is customarily considered as more than an assignment of a chose in action," citing 54 Am. Jur. 95, §105,

where it appears that "an assignment of his interest by the beneficiary of a trust is usually regarded as something more than an assignment of a chose in action; it is rather a transfer of right, title and estate in and to property." The last above quoted language appears to have been taken from *Blair v. Commissioner of Internal Rev.*, 300 U. S. 5, 57 S. Ct. 330, 81 L. ed. 465, text 471.

Under §199.02(2), F. S., "Class B intangible property is hereby defined as being . . . the beneficial interest of residents of Florida in trust estates of all kinds when the trustee resides outside of the state, or if the trustee is a corporation and has its principal place of business outside of the state . . . provided, further, that when the trustee is a resident of Florida and returns the corpus of the trust for taxation as provided by law there shall be no tax upon the beneficial interest in such trust." The real estate trust whose prospectus we mentioned in the first part of this opinion is stated in said prospectus to be "an unincorporated association in business trust form created in Florida." We construe this statement to mean that the business trust mentioned has been duly qualified under Ch. 609, F. S., and has its situs in Florida. In *Bancroft Inv. Corp. v. Jacksonville*, 157 Fla. 546, 27 So. 2d 162, text 167, the statement is made that "under Florida taxing statutes the levy and assessment is on the realty itself, at its full cash value, regardless of the existence of estates in it."

Ordinarily, trustees have no power to issue securities, as obligations of the trust estate, and secure them by mortgage or lien encumbering the trust estate; however, a trustee may be given that power by express provision in the trust instrument or by implication (90 C. J. S. 487, et seq., §311, et seq.; 54 Am. Jur. 378, et seq., §476, et seq.; 33 Fla. Jur. 99, §99). Securities legally issued by trustees appear to be within the purview of §199.02(2), F. S., when in the form of bonds, notes, and like instruments, which represent a charge upon the trust estate and not merely an interest therein. Such bonds, notes and like instruments, when registered, are within §199.02(2)(a)3., F. S., requiring the filing with the comptroller of a "list of all *registered* holders of its securities." Interests of beneficiaries or cestuis que trustent are not securities but equitable titles or property interests in the real and personal property of the trust.

Chapter 201, F. S., imposes a documentary stamp tax on several documents, bonds, debentures or certificates of stock and indebtedness, and other instruments mentioned in said chapter. Section 201.02 imposes a tax "on deeds, instruments or writings, whereby lands, tenements, or other realty, or any interest therein, shall be granted, assigned, transferred or otherwise conveyed to or vested in the purchaser . . ." Sections 201.04 and 201.05 relate to corporate stock and other interests not applicable here because no corporation is involved. Section 201.07 imposes a documentary stamp tax on "all bonds, debentures or certificates of indebtedness issued in the state by any person," also upon certain corporate documents not here involved. Section 201.08 imposes a like tax on "promissory notes, non-negotiable notes, written obligations to pay money, . . . made, executed, delivered, sold, transferred or assigned in the state . . ." The term *person*, as used in the Florida Statutes, except where the content clearly evidences otherwise, "includes individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations

and other groups or combinations." We are, therefore, of the opinion that deeds, instruments, writings, stock, bonds, debentures, certificates of indebtedness, notes, written obligations to pay money, and other obligations mentioned in the above cited sections of the statutes, issued by trustees, business trusts and other fiduciaries, are subject to documentary stamp taxes when within the purview of any of said sections, unless entitled to tax exemption under some statute or constitutional provision.

We come next to the application of §201.02, F. S., to shares or other evidence of beneficial interest in real and personal property in this state. Said §201.02 imposes a documentary stamp tax "on deeds, instruments, or writings, whereby any *lands, tenements or other realty*, or any interest therein, shall be granted, assigned, transferred or otherwise conveyed to or vested in the purchaser" This is clearly a reference to real and not personal property unconnected to realty. Although shares or other beneficial interests in personal property may exist, such shares or other beneficial interests not being of real property, but of personal property, are not within the purview of said §201.02. Upon the question of the application of §201.02, F. S., to equitable titles to real property, see AGO 059-244, Nov. 25, 1959, as revised Feb. 25, 1960 (1959-1960 AGO 381-385) holding equitable titles to be within said §201.02, F. S. The said opinion appears to be applicable to shares or other evidence of beneficial interests in real property, where such shares or beneficial interests vest an equitable title in their holders.

The above stated questions are answered as follows:

1. Shares or other evidence of beneficial interests in real and personal property held in trust, issued by the trustee or trustor, are intangible personal property subject to taxation under Ch. 199, F. S., only when the trust estate itself is not subject to ad valorem taxation in this state.

2. Obligations issued by a business trust, in the form of bonds, notes and like instruments, secured by lien on trust property or unsecured, are intangible personal property subject to taxation under Ch. 199, F. S., when they have a tax situs in this state. This does not include certificates or other evidences of an interest in the trust property. Such bonds, notes and like instruments are within the purview of §199.02(2)(a)3., and when registered must be reported to the state comptroller when they have a tax situs in Florida.

3. This question goes to the issuance or transfer of shares or other evidence of beneficial interest in property held in trust. Such shares or other evidence of beneficial interests in real property are within the purview of §201.02, F. S.; however, such interests in personal property are not within said §201.02, it being limited to real property and interests therein. AGO 059-244 above mentioned is applicable here, and should be referred to and followed.

4. Obligations issued by a business trust, if otherwise within the purview of the several sections of Ch. 201, F. S., whether secured or unsecured, are subject to documentary stamp taxes, unless within some express exemption provision of the Florida constitution, statutes or laws.

062-56—April 20, 1962

JUVENILE COURTS

RECORD DESTRUCTION—OFFICIAL RECORDS, SOCIAL RECORDS; §§39.12(2), 119.04, F. S.

To: *W. R. Culbreath, Juvenile and Domestic Relations Court, Miami*
QUESTION:

Under §39.12(2), F. S., does the juvenile court have the authority to destroy all records pertaining to a child, both those described as official records and those described as social records, 10 years after the last entry was made?

Section 39.12(2), F. S., provides, among other things, as follows: That the juvenile court shall make and keep records of all cases brought before it, and shall preserve the records pertaining to a child until 10 years after the last entry was made, and may then destroy them, "*except that records where orders were entered permanently depriving a parent the custody of a child shall be preserved permanently.*" (Emphasis supplied.)

I also wish to call your attention to §119.04, F. S., which provides for any state, county, or district officer, board, department, commission or institution to destroy any public record in their custody upon the approval of the public records screening board which shall specify whether such records shall be photographed prior to their destruction.

In view of the foregoing, it is my opinion that the records of the juvenile court, except the records which permanently sever the custody of the child from its parents may be destroyed after a period of 10 years, subject to the approval of the records screening board.

Therefore, subject to the foregoing limitations, your question is answered in the affirmative.

062-57—April 20, 1962

ESTATES OF DECEDENTS

TRUSTEES POWERS AND DUTIES—VESTED RIGHTS—
INTEREST OF TRUSTEE—LAWS ENACTED SUBSE-
QUENT TO CREATION OF TRUST—§§660.10, FOR-
MER §§655.27, 731.05, F. S.; CHS. 16103, 1933;
18399, 1937; 28061, 1953, LAWS OF FLORIDA

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where a will or other written instrument made, executed and delivered in another state, around May of 1937, had the effect of vesting certain real property located in Florida in a foreign corporation as trustee for specified beneficiaries, such trust being of such nature that it was not executed prior to the effective date of §660.10, F. S., may the said trustee complete the execution of the said trust after the effective date of said section?

We gather from the file that the trust in question was set up by the last will and testament of a nonresident of Florida who died testate April 24, 1937, and which will was probated in either May

or June of 1937, which trust vested title to Florida real estate in said trustee to be held and operated by it during the lifetime of designated beneficiaries, the income therefrom to be paid to the said beneficiaries during their lives, with the remainder passing upon their death to certain designated remaindermen. This trust remained active until around 1958, when the property was conveyed by trustee's deed to the remaindermen or their nominee or grantee.

This seems to pose the effective date of said §660.10, F. S., and its effect, if any, on the powers and rights of the trustee to further deal with the trust property. Although said §660.10 appears to have been derived from §3, Ch. 28016, 1953, it further appears that said §3 was derived from §655.27, F. S., 1951, which in turn had been derived from §1, Ch. 18399, 1937. Chapter 28016, 1953, was a revision, amendment and codification of the then existing banking laws of Florida, which included said §655.27, F. S. Said Ch. 18399, 1937, became effective on June 10, 1937, after the death of the said testator on April 24, 1937. As a general rule, a will takes effect at the time of the death of the testator (94 C. J. S. 901, §128; 57 Am. Jur. 795, §1209; §731.05, F. S.). Said §731.05 provides that "a will becomes effective at the time of the death of the testator." This section was derived from §6, Ch. 16103, 1933, which became effective Oct. 1, 1933, and was in full force and effect when the above mentioned will was made and executed, and when probated.

For the purposes of this opinion, we presume that the language of the said §660.10 is sufficiently broad to have prohibited the trustee in question from being named as such trustee had the same been in full force and effect when the will in question was made and executed by the testator on April 24, 1937. "Statutes framed in general terms and not plainly indicating to the contrary will be construed as prospective, so as to apply to persons, subjects and things within their purview and scope coming into existence subsequent to their enactment (82 C. J. S. 558, §319; *State v. Jacksonville, Fla.*, 50 So. 2d 532, text 536). These authorities cast doubt upon the intention of the legislature to make said §660.10 applicable to trustees and trust property which had been vested in trustees for the benefit of beneficiaries prior to the effective date of said section. The statement is made in 16 C.J.S. 1199, §229, that the rights acquired by a trustee under a private, active trust are vested, and may not be impaired by subsequent legislation. See also 11 Am. Jur. 1204, §375, relative to the divesting of vested rights by subsequent legislation and the validity thereof. There is nothing in above-mentioned Ch. 18399, 1937, indicating any intention to make the said act retroactive as to trustees of prior trust estates antedating the enactment of the said act.

The above question is answered in the affirmative.

The question is answered on the ground that said Ch. 18399, 1937, as well as former §655.27, and present §660.10, F. S., were not retroactive and did not reach trusts in existence when the statutes in question were enacted and became effective. Also some comments were made concerning vested rights; the conclusion hereof did not reach the question of vested rights, the same being deemed not necessary to the above conclusion.

062-58—April 23, 1962

MINORS

JURISDICTION OF COUNTY JUDGE'S COURT AND JUVENILE COURT—§§12, 6, 7, ART. V, STATE CONST.; CH. 39, §39.01 (10), (11), F. S.; CH. 30380, LAWS OF FLORIDA, 1955

To: Harvey E. Page, County Judge, Pensacola

QUESTION:

Does the county judge's court, or the separate juvenile court of a county having both, or both such courts, have jurisdiction over the appointment of a guardian or custodian for a minor under the age of 16 years, when such a guardian or custodian is deemed necessary or proper?

The above question may have some application to Escambia county where, by Ch. 30380, 1955, a juvenile division of the court of record for Escambia county was established. This division of said court seems to exercise, under said chapter, a jurisdiction over infants under the age of 17 substantially identical, if not identical, with that exercised by juvenile courts established under and pursuant to §12, Art. V., State Const., as implemented by Ch. 39, F. S.

Under §12, Art. V, State Const., the legislature of Florida is authorized to "define the jurisdiction and powers of such (juvenile) courts and the officers thereof, and to vest in such courts exclusive original jurisdiction of all or any criminal cases where minors under any age specified by the legislature from time to time *are accused*, including the right to define any or all offenses committed by any such persons as *acts of delinquency instead of crimes* (emphasis supplied) . . . without being limited therein by the provisions in this constitution. . . as to original jurisdiction of the interests of minors in §6 of this article," (§12, Art. V, State Const.). Chapter 39, F. S., provides for the enforcement of this section of the constitution, and the procedures therefor, by and through the juvenile courts established thereunder. Said §12, Art. V, being a limitation upon the legislature, of necessity limits the operation of the said statutes to the provisions and limitations of said constitutional section.

Under the said constitutional section, acts and offenses which would, if committed by persons over the age of 16, be criminal offenses, are, when committed by persons under the age of 16, delinquencies instead of crimes. Said §12, Art. V, State Const., and Ch. 39, F. S., relate only to dependent and delinquent children as defined in §39.01 (10) and (11), F. S. Juvenile courts in this state have an exclusive original jurisdiction of dependent and delinquent children, domiciled, living or found within their jurisdictional areas.

Section 7, Art. V, State Const., provides for the county judge's courts and their jurisdiction, which consist of certain common law jurisdiction, jurisdiction over forcible entry and unlawful detention of real property and specified criminal jurisdiction, and "*jurisdiction of the settlement of the estates of . . . minors, to grant letters . . . of . . . guardianship, and to discharge the duties usually pertaining to courts of probate.*" This jurisdiction, as stated by the court in *Wells v. Menn*, 154 Fla. 173, 17 So. 2d 217, text 218, extends to "anything reasonably pertaining to the settlement or administration of the estates of decedents and minors as contemplated with-

in the jurisdiction of the probate judge." Guardianships over minors often relate to the guardianship of the person of the minor, as well as guardianship of the ward's property; however, the statement is made in 39 C. J. S. 16, §6, that "the same person may be appointed as guardian both of the person and estate (of the minor) or, according to the weight of authority, separate guardians may be appointed. Often minors with natural guardians of their persons, for example, their parents, have an estate under the guardianship of a guardian duly appointed by the county judge's court, or other court of competent jurisdiction, who are also guardians of their persons.

There appears to be no reason why, by reason of statutory or constitutional provisions, one court may not have jurisdiction over the person of an infant while another court has jurisdiction over the property of such infant; where this is true, there appears no reason why each such court, within the sphere of its jurisdiction, may not exercise jurisdiction over the person or property of the infant within its jurisdiction while at the same time the other court exercises a like jurisdiction within its sphere of jurisdiction. Where there should be an overlapping of jurisdiction, the court first exercising that jurisdiction should be permitted to maintain the same without interference by the other court. From a cursory reading of the constitution and statutes relating to juvenile courts in this state, we are inclined to the view that the jurisdiction of the juvenile courts of this state are confined to jurisdiction over dependent and delinquent children as defined in §39.01 (10) and (11), F. S. Unless a child may be brought under one or the other of these classifications, a juvenile court has no jurisdiction over him. Juvenile courts would have no jurisdiction to appoint guardians over the property of minors, even those within their jurisdiction, so as to authorize the appointment by them of guardians over the property of such juveniles; however, they would very likely have jurisdiction to provide for the temporary custody over such property in order to preserve it until the county judge's court could assume jurisdiction and provide a guardian thereof.

We entertain doubt as to the jurisdiction of the juvenile courts to appoint general guardians for the person of minors within their jurisdiction; however, they doubtless may provide necessary custodians of minors brought within their jurisdiction pending the disposition of proceedings involving them.

These observations seem to answer the above stated question as well as the same may be answered from the facts now before us.

Mention is here made of the provision in §2, Ch. 30380, 1955, establishing the juvenile division of the court of record for Escambia county, providing that "*the judge of the juvenile division shall in addition to the juvenile jurisdiction conferred upon him, have and be empowered to exercise all of the jurisdiction, authority and powers of other judges,*" of the said court of record. (Emphasis supplied.) This provision would seem to permit the judge of the said court of record presiding over the juvenile division, to hear and determine other cases within the said court of record, including cases pending on the equity side thereof. The fact that the judge assigned to preside over the juvenile division of the court presides over juvenile court matters involving children, would not seem to disqualify his hearing and disposing of equity cases involving the custody of children. If both the court of record and the county judge's court had a child custody matter filed therein involving the

same child, the one first assuming jurisdiction should be permitted to finally dispose of the matter before it without interference from the other court.

062-59—April 24, 1962

TAXATION

PROCEEDS OF TAX DEED SALES, DISPOSITION—OUTSTANDING PRIVATELY-OWNED TAX SALE CERTIFICATES—§§192.21, 194.15, 194.22, 196.12, 95.021, 167.43, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

What disposition, if any, should be made by the clerk of the circuit court, when making disposition of the proceeds from tax deed sales under and pursuant to §194.22, F. S., where there are outstanding tax sale certificates and liens privately held?

Under §194.22, F. S., where property sold under a tax deed proceeding maintained under §§194.15, et seq., F. S., is "purchased for an amount in excess of the statutory bid of the certificate holder . . . such excess shall be forthwith paid over and distributed by the clerk to the municipality or other taxing district, if any, holding liens for general taxes of equal dignity with county taxes upon said property, for payment of the liens in full, if such excess be sufficient for such purpose . . . and if there remains any excess *after the payment of all liens for general taxes* upon said property and there are unpaid liens for special assessments held by any municipality or other taxing district, the clerk shall pay such excess to such municipality or taxing district. After all liens for general taxes and special assessments of the municipality, or other taxing districts, upon said property are paid in full, the balance of the purchase price shall be retained by the clerk and notice mailed to the owner of such land, if his address be known to the clerk, that this sum will be paid to him upon demand . . ." (emphasis supplied). This provision seems to indicate an intent that all outstanding general taxes and special assessments be paid before any of the proceeds of the tax deed sale are paid over to the owner, whether such tax liens be held by the county, municipality or taxing district. The above emphasized phrase "after the payment of all liens for general taxes," would seem to extend to those persons who have purchased tax certificates at tax sales or who have procured the assignment of tax certificates and liens from the county, municipality or district.

Under §192.21, F. S., "all taxes imposed pursuant to the constitution and laws of this state shall be a first lien superior to all other liens on any property against which such taxes have been assessed and shall continue in full force and effect until discharged by payment" or are barred by limitation (see §§95.021 and 196.12, F. S.). The phrase "taxes imposed pursuant to the constitution and laws of the state" are, in the words of *Allison Realty Co. v Graves Inv. Co.*, 115 Fla. 48, 155 So. 745, text 750, "state county and municipality taxes as distinguished from special assessments." In *Sanford v. Dial*, 104 Fla. 1, 142 So. 233, text 238, it was held that "state, county and municipal taxes are 'imposed pursuant to the constitution and laws of this state.'" State, county and municipal tax liens for general taxes are of equal dignity, each to the other (*Tampa v.*

Suarez, 115 Fla. 1, 155 So. 804), even though "unpaid state and county taxes are for years subsequent to the years for which municipal taxes are due and unpaid," or vice versa.

The purchaser of a tax lien or certificate at a county or municipal tax sale, or who obtains an assignment thereof from the county or municipality, obtains the tax lien of the county and holds the same in that capacity. His lien is on a parity with that of other like tax liens encumbering the property described in his tax lien. Such tax certificates and liens should be deemed on a par with the tax liens of the county and municipality and within the purview of the above quoted language from §194.22, F. S.; and this without any distinction between county and municipal tax sale certificates and liens. Individually held county tax sale certificates, whether purchased at tax sales or taken by assignment from the clerk, are subject to redemption which may be "made through the clerk of the circuit court of the respective counties wherein such lands are situated." In order to effect a redemption of the county tax lien encumbering his property the owner of the land has only to go to the clerk's office and redeem the same through his office. The distribution of the proceeds of sale in accordance with §194.22, F. S., is in effect a redemption of the tax liens in whole or in part as the proceeds of the sale will permit. County held certificates may be redeemed by the owner in a like manner.

Municipalities having no specific provision in their charters "enforce the receipt and collection of the same (taxes) in the manner" provided by law for the collection of state and county taxes (§167.43, F. S.). Doubtless municipal corporations issuing tax sale certificates to purchasers at the tax sale, or making assignment of tax certificates and tax liens, to purchasers thereof, also make provision for the redemption thereof by payment to some municipal or other officer or department. Where this is the case the clerk may follow the plan provided for the redemption of tax liens by the owner of the land. Under these circumstances there appears to be little, if any, reason, for the clerk to locate the actual certificate holder, but may proceed in the same manner the land owner might have proceeded to effect a redemption of his lands from the tax lien.

The above and foregoing seems to sufficiently dispose of the above stated question, and outline the manner for the clerk's handling of tax sale certificates and liens held by persons, firms and corporations. When this outline procedure is followed, we believe that the clerk will be adequately protected by the statutes, as fully as he is protected when he permits redemption by the property owner of tax certificates held by persons, firms and corporations.

062-60—April 25, 1962

COUNTY SCHOOL SYSTEM

PERSONNEL—AVAILABILITY OF RECORDS TO PUBLIC— §§231.29, 119.01, 119.02, 229.08(16) (e), F. S.

To: *Thomas D. Bailey, State Superintendent of Public Instruction, Tallahassee*

QUESTIONS:

1. Are all files, records, films, and data on teachers held by this department public records?
2. Are all public records required to be made avail-

able to government agencies, individuals and corporations making inquiries?

3. What is the responsibility of this department when requested to collect, or compile information from our files for requesters?

4. Our capacity for associating and comparing data and thus deriving additional information is being increased greatly. What is the responsibility of this department in furnishing this derived information, upon request, to government agencies, individuals and corporations?

5. Does §231.29 specifically prohibit this department from making statements of academic preparation, professional training, and teaching experience available to anyone except those listed therein as specifically entitled to this information?

Section 231.29, F. S., provides, in part:

Record of personnel.—The state superintendent shall maintain a complete statement of the *academic preparation, professional training, and teaching experience of each person to whom a certificate is issued.* The applicant, or the county superintendent, shall furnish the information making up such records on blanks furnished by the state superintendent. The state superintendent shall furnish a transcript of all essential information in this statement to the county superintendent in the county where the person is employed.

(1) The county superintendent shall be responsible for the records of each person employed in his county. *The file of each person shall be open to inspection only by the county board, the county superintendent, the principal, the person himself, and by such other person as he may authorize in writing.*

(2) By July 1 of each year and at each time that employment is terminated, the principal or the county superintendent shall evaluate the services of each certificate holder, *and such evaluation shall become part of the personnel file required of this section, and a copy shall be forwarded to the state superintendent for his file.*

(3) The state board shall by regulation prescribe the procedures for evaluating the services of instructional personnel.

(4) *Whenever a person ceases to be employed in any county, the county superintendent shall send the personnel file to the state superintendent.* (Emphasis supplied.)

Section 119.01, F. S., provides:

Public records open to examination by citizens.—All state, county and municipal records shall at all times be open for a personal inspection of any citizen of Florida, and those in charge of such records shall not refuse this privilege to any citizen.

Section 119.02, F. S., provides that violation of §119.01, F. S., is a misdemeanor.

Generally speaking, in view of the provisions of §119.01, F. S., quoted above, all school records shall be open at all times for a personal inspection of any citizen of Florida. This 1909 act would appear to be all-inclusive except in instances where it has been modified by subsequent acts of the legislature as in the case of §231.29, *supra*,

which was enacted originally as Ch. 19355, 1939, and last amended by Ch. 61-286, 1961.

You will note that §231.29 (1), F. S. specifically provides that the file of each person (employed by the county school board) shall be open to inspection only by the county board, the county superintendent, the principal, the person himself, and by such other person as he may authorize in writing. Section 231.29 (4), F. S., provides that when "a person ceases to be employed in any county, the county superintendent shall send the personnel file to the state superintendent."

AS TO QUESTION 1:

Question 1 is answered in the affirmative, except that the personnel file that is transmitted to the state superintendent by the county superintendent after termination of employment of a teacher is not open to public inspection except by the state superintendent and his staff, the county board, the county superintendent and the principal of the county and school where the teacher had been employed, the teacher himself or such person as he may authorize in writing. This restriction has its express and implied effect from the provisions of §231.29 (1) and (4). For §231.29 (1) to be effective, it must apply to the county superintendent's personnel file whether it is in his hands or in the hands of the state superintendent. All other records or files concerning a teacher which the state superintendent has made previous to the receipt of such personnel file or which he has independently made are open to public inspection with the exception of investigative data and records kept confidential by §229.08 (16) (e). This interpretation seems to reconcile the provisions of the governing statutes as well as it can be done. To sum up, it appears the office of the state superintendent is a depository of general records and school information for the public generally, whereas the county superintendent's records have local application only.

AS TO QUESTION 2:

Question 2 is similarly answered in the affirmative, except that said personnel files transmitted by the county superintendent and said confidential hearing data are not open to public inspection, but material may be taken from personnel files by the state superintendent if necessary to complete his separate records.

AS TO QUESTION 3:

Section 231.29, F. S., requires the state superintendent to furnish the county school superintendent a transcript of the academic record of a person employed in the county. The state superintendent and his department have a duty to compile and report to the legislature each biennium as to the general facts and circumstances affecting the state school system.

As stated above, the academic records obtained on personnel for certification purposes and other records not specifically made confidential by statute are public records open for public inspection.

It is my opinion that it is discretionary with the state superintendent of public instruction as to what non-privileged information he will compile and furnish to other governmental agencies, individuals or private corporations. However, it is customary, though not required, that wherever possible, a governmental official or agency should compile and furnish pertinent information to interested officials and persons within the reasonable limits of his means and personnel when it can be done without detriment to the efficient discharge of his primary functions.

AS TO QUESTION 4:

Question 4 is answered similarly as question 3 above. In other

words, within the limitations set by the legislature it is discretionary with the state superintendent as to what information his department shall compile for others unless he shall be directed to do so specifically by the legislature or the state board of education, or in some instances he may be obligated to compile specific information by regulation of the federal government when federal funds may be involved.

Question 5 is answered in the negative. Section 231.29 (1) has reference to the county superintendent and personnel files kept by or transmitted after employment is terminated to the state superintendent. It does not relate to other records kept or compiled by the state superintendent as required by law. It is our opinion the state superintendent is not prohibited from making such statements to anyone so long as it is not taken from privileged material.

062-61—April 27, 1962

COMPENSATION OF COUNTY OFFICIALS

JUSTICES OF THE PEACE, CONSTABLES, COUNTY PROSECUTING ATTORNEYS—APPLICATION—CH. 61-461, LAWS OF FLORIDA; CH. 145, 1961, §§145.01 and 145.02, 1959, F. S.

To: *Bryan Willis, State Auditor, Tallahassee*

QUESTION:

What is the maximum allowable compensation for the calendar year 1961 of justices of the peace, constables and county prosecuting attorneys under applicable general laws?

Chapter 61-461 became effective July 1, 1961. Said chapter by its title purports to repeal §§125.161, 145.01 and 145.02, Florida Statutes, and in addition states the office of said chapter to be the amendment of Chapter 145, F. S., "to provide for annual compensation of county officers. . . ."

Section 1, Ch. 61-461, provides that: "Chapter 145, F. S., is amended to read: "Thus, the answer to your query turns on whether the repeal of §§145.01 and 145.02, F. S., together with the language of §1 of said chapter operates to totally repeal §145.01 and §145.02 as they appear in F. S. 1959.

The body of said chapter now appears in Ch. 145, F. S. 1961. Pertinent sections will hereinafter be designated by their statutory section number.

Section 145.011 (2), F. S., sets forth the legislative intent to "establish for the several county officers the compensation provided in §§145.031-145.11." Said sections enumerate on an individual county classification basis the compensation of the following county officers:

- (1) Members, boards of county commissioners (§145.031)
- (2) Members, boards of public instruction (§145.041)
- (3) Clerks of the circuit courts (§145.051)
- (4) County judges (§145.061)
- (5) Sheriffs (§145.071)
- (6) Superintendents of public instruction (§145.08)
- (7) Supervisors of registration (§145.09)
- (8) Tax assessors (§145.10)
- (9) Tax collectors (§145.11)

Nowhere in Ch. 145 is to be found a statement of the maxi-

imum annual compensation of justices of the peace, constables or county prosecuting attorneys. Nor does the body of Ch. 61-461, Laws of Florida, or Ch. 145, F. S., contain language indicating an intention to repeal §§145.01 and 145.02, F. S. 1959, which establishes the maximum allowable annual compensation for justices of the peace, constables and prosecuting attorneys operating their offices under the provisions of general law at \$7500 per year.

Generally, a later legislative expression governs. *State v. Board of Pub. Instr. of Escambia County* for and on behalf of Special Tax School Dist. 1 of Escambia County, 113 So. 2d 368. The function of the courts is to ascertain and give effect to the legislative intent in enacting a statute (*State ex rel Florida Jai Alai v. State Racing Comm.*, 112 So. 2d 825).

A court, in construing the statute must regard the legislative intent as a guiding factor, and such intent must be given effect even if it appears to be contradictory to strict wording of the statute and to rules of construction (*City of Fort Lauderdale v. Des Camps*, 111 So. 2d 693).

A literal interpretation should not be accorded a statute if it leads to an unreasonable conclusion or to a result not contemplated by the lawmaking body. In *Re Blankenship's Estate*, 114 So. 2d 519; decision quashed, 122 So. 2d 466.

Also in construing a statute, courts are required to look to history's objective and the purpose of the legislature. (*Sunshine State News Co. v. State*, 121 So. 2d 705).

Careful examination of Ch. 61-461 reveals that although its title purports to repeal in toto §§145.01 and 145.02, F. S. 1959, said chapter reveals a legislative intention that its provisions be applicable only to those county officers whose annual compensation has therein been designated, viz., members, boards of county commissioners, members, boards of public instruction, clerks of circuit courts, county judges, sheriffs, superintendents of public instruction, supervisors of registration, tax assessors and tax collectors.

It has long been the general law of this state that county officials who are paid by fees or commissions have, as their annual compensation, all the net income from their office not to exceed \$7500. (Sections 145.01-02, F.S., 1959.)

I am of the opinion that the legislative enactment of Ch. 61-461, which now appears as Ch. 145, F. S. 1961, is ineffectual to repeal the provisions of §§145.01 and 145.02, F. S. 1959, except as to the particular county officers designated in the compensation schedules as appear in Ch. 145, 1961. The maximum allowable compensation under the general law of justices of the peace, constables, and county prosecuting attorneys for the calendar year 1961 would therefore be \$7500 per annum.

062-62—April 27, 1962

ELECTORS AND ELECTIONS

CONSTRUCTION OF ELECTION REQUIREMENT OF §22, ART. VIII, STATE CONST., MAJORITY OF ELECTORS—
§10, ART. XII, STATE CONST.; CHS. 61-2370; 1695,
1869, LAWS OF FLORIDA

To: *Walter Warren, Attorney at Law, Leesburg*

QUESTION:

What is the proper construction of the provision in

§22, Art. VIII, State Const., that legislation thereunder is not effective "until approved by a majority vote of the electors qualified to vote in such municipality, voting at an election called for such purpose?"

Your request for opinion was directed to the language of §10-A, Ch. 61-2370, adopted under and pursuant to §22, Art. VIII, State Const.; however, when the language of said §10-A is compared with that of said §22, Art. VIII, we find that the language of said §10-A was taken verbatim from said §22, Art. VIII, of the said constitution. Section 10-A merely reiterates the language of said §22, Art. VIII, of the constitution. We are satisfied that a construction of said §22, Art. VIII, of the constitution, will, in the last analysis, construe said §10-A, Ch. 61-2370.

In *Harris v. Baden*, 154 Fla. 373, 17 So. 2d 608, text 609, the act in question provided that "shall become effective upon its being approved and ratified by a majority of the qualified electors of the territory described." In this territory there was registered a total of 2,674 electors; at the election in question a total vote of 377 was cast, of which 264 were for approval and 136 for disapproval. It was contended by one of the parties that a vote of at least a majority of the said 2,674 was necessary for approval; to which contention the court remarked "we do not agree." It appears to have been the theory of the court in this case that "electors who are qualified to vote at an election and yet do not avail themselves of this privilege are deemed to have assented that the question shall be determined by those who do vote." In *Bell v. Ocala*, 62 Fla. 431, the total number of registered electors appears to have been 196, of which number 163 voted for and 24 against; this was held a valid election under a requirement that bonds may be issued "when authorized by a vote of a majority of the registered voters of the city."

Section 10, Art. XII, State Const., provides for school districts and school district taxes to be fixed "whenever a majority of the qualified electors thereof that pay a tax on real, or personal property, shall vote in favor of such levy." This was construed, in *Pickett v. Russell*, 42 Fla. 116, 28 So. 764, text 771 and 772, as not requiring the affirmative vote of a majority of the qualified electors, but merely a majority of those voting at the election. Chapter 1695, 1869, provided that a county seat may be located by a vote of a majority of the legal voters voting upon the question; the phrase, *majority of the legal voters*, was construed to mean a majority of the qualified electors who vote at the election. *State v. Marshall*, 135 Fla. 214, 184 So. 870, involved a provision in the municipal charter of Jacksonville that the city attorney was to be appointed by the city commission, "subject to the approval by the affirmative vote of two-thirds of the members of the city council." The city council consisted of 23 members, of which 14 voted for approval of the action of the city commission, and seven against such action, with two members passing and not voting. The court held that there had been an approval of the action of the city commission. The court appears to have followed the common law rule that "whenever electors are present and do not vote at all, they virtually acquiesce in the election made by those who do."

From the above and foregoing there is reasonable reason to believe that the courts of this state would construe the provisions quoted in the above question as requiring only a majority vote of

those qualified electors voting, accompanied with a presumption that those not voting acquiesced in the election as held. However, only the courts may make a final and binding construction of the meaning of the language so quoted, as the exact provision quoted has not yet received appellate court construction.

062-63—May 2, 1962

ALCOHOLIC BEVERAGE ADMINISTRATION LAW
CONSTRUCTION OF PHRASE "NONRESIDENT GUEST"—
CLUB BEVERAGE LICENSES—§561.34(11), F. S.

To: *Thomas E. Lee, Director, State Beverage Department, Tallahassee*

QUESTION:

Are there any exceptions to the provision in §561.34(11), F. S., whereunder officers, members or employees of a licensed club cannot sell or distribute or serve alcoholic beverages to anyone other than a member or his nonresident guest?

Your letter indicates that the state beverage department in administering §561.34(11), F. S., has construed the phrase "nonresident guest" as meaning a nonresident of the county in which the license is granted. It is further stated that the beverage department has insisted upon strict enforcement of the beverage law, and that in so doing, you have administratively construed the phrase "nonresident guests" as meaning persons who were not residents of the county in which the club license was granted, inasmuch as such are allotted on the basis of county quotas.

Together with your letter requesting the advice of this office, you enclosed a copy of a letter received by your department from the Pensacola country club, Pensacola yacht club, and Scenic Hills country club, which letter informs you that the administrative construction of the phrase "nonresident guests" which is being enforced by the beverage department has the effect of preventing the members of those clubs from using the facilities of their respective clubs for the purpose of entertaining nonmember residents of Escambia county. Additionally, it is contended that your department's ruling has the effect of preventing the use of the facilities of such clubs by members for the purpose of holding wedding receptions and such affairs which are intended to be private in nature.

In reviewing the Florida cases and those of our sister states, we fail to find a case construing the specific phrase "nonresident guest" as it relates to a beverage license held by a social club. However, in U.S.S. Tampa post 5 of *American Legion v. Schleman*, 53 So. 2d 302, the Florida supreme court in construing §561.34(11) with reference to a zoning matter stated the following:

For all practical purposes they were allowed to extend the limits of their own homes to their club life.

Thus, it is in light of this judicial declaration of legislative intent that we must determine the administrative interpretation which ought be accorded the act authorizing club licenses.

Section 561.34(11), F. S., states in material part as follows:

The payment of such club license tax shall authorize the service and distribution to members and nonresident

guests of the club only and such service and distribution to said members and nonresident guests shall not be deemed sales within the meaning of the law in this state but any service or distribution to anyone other than a member or nonresident guest of such licensed club shall be deemed a sale and any officer, member or employee of any such licensed club who shall sell or distribute or serve any such beverages to any person other than a member or nonresident guest of such club *for money or other value shall be deemed guilty of selling such beverages without a license and shall be punished as provided by law.* (Emphasis supplied.)

The italicized portion of the foregoing excerpt from §561.34(11) declares that which is prohibited and imposes a penalty for violations thereof. It does not appear to prohibit sale, service or distribution to persons who are residents of the county wherein the club is situated who are guests of club members unless such guests pay money or other value to the club for the drinks or service thereof. Thus, it would further appear that where a "resident guest" of a club member does not pay a consideration for a drink, but rather the consideration is paid by the member, the club does not appear to be committing any violation of §561.34(11), F. S., because the service or distribution of the drink is not supported by consideration advanced by the "resident guest."

The term "nonresident guest" is not defined in the statute. It has been assumed that it has reference to persons residing outside the county in which the club is located. We believe this construction is discriminatory because it unequally treats guests of the club on the basis of their geographic residence. Numerous cases can be cited to support the proposition that this classification is without a proper basis because whether a guest is a resident of the county in which the club is located or from another county does not promote the public welfare, safety or morals. We think that the proper construction of the term "nonresident guests of the club" covers all bona fide guests of the club, regardless of whether they are residents of the county where the club is located or elsewhere. The term "nonresident guest" is essentially the same thing as "nonmember" inasmuch as the limits of their homes are not extended into the club life as are those of the club members, to paraphrase the language of the Florida supreme court. They are guests and as such have no resident status directly or constructively in the club by extension of the limits of their homes. They can only come into the club as guest. The fact that they are residents of the county in which the club is located is immaterial. Properly construed, the statute means they have no extended residency into the club as do members in the club.

Therefore, your question is answered in the affirmative.

062-64—May 4, 1962

UNIFORM RECIPROCAL SUPPORT ACT

ENFORCEMENT BY RESIDENT OF ANOTHER STATE AGAINST RESIDENT OF THIS STATE—CH. 88;

§88.021, 88.031 (6), 88.041, 88.281, F. S.

To: J. Lancelot Lester, State Attorney, Key West

QUESTION:

1. Where a divorce decree entered by the circuit

court of Monroe county, in a suit between residents of that county, awarded the custody of the minor children to the mother and required the father to make payments for their support, and where the mother thereafter left Florida with said children and took up residence in another state, and where the father continues to reside in Monroe county, may the said circuit court entertain a proceeding brought by the mother against the father under the uniform reciprocal enforcement of support law?

2. Under the facts stated in question 1, must the mother proceed in said circuit court for a rule against the father commanding him to show cause why he should not be adjudged in contempt for failure to comply with the support provisions contained in the divorce decree?

For the purposes of this opinion, it will be assumed that the state in which the mother resides has adopted either the uniform reciprocal enforcement of support law or a substantially similar reciprocal law.

The said uniform reciprocal enforcement of support law was enacted by the Florida legislature in 1955 and is found in Ch. 88, F. S. Section 88.021 sets forth the purposes of the law in words as follows:

88.021 Purposes.—The purposes of this chapter are to improve and extend by reciprocal legislation the enforcement of duties of support and to make uniform the law with respect thereto. (Emphasis supplied.)

Section 88.031 (6) defines "duty of support" as follows:

(6) "Duty of support" includes any duty of support imposed or impossible by law, or by any court order, decree or judgment, whether interlocutory or final, whether incidental to a proceeding for divorce, judicial separation, separate maintenance or otherwise. (Emphasis supplied.)

Section 88.041 provides as follows:

88.041 Remedies additional to those now existing.—The remedies herein provided are in addition to and not in substitution for any other remedies. (Emphasis supplied.)

Even if none of our Florida courts had ever made any pronouncement on the subject, it would be clear from the above-quoted statutory provisions that it was the purpose of the said uniform law to provide an additional and supplemental remedy for the enforcement of the duty of support owed by the father under the above-mentioned circumstances, and that said duty of support may be enforced under said uniform law without any necessity for the mother to have a rule issued against the father requiring him to show cause why he should not be held in contempt for failure to comply with the support provisions of the divorce decree.

However, the supreme court of Florida dealt with a similar situation in *Thompson v. Thompson*, 93 So. 2d 90, and its opinion in that case supports our conclusion. In that case, a divorce decree entered by the circuit court of Volusia county, Florida, required the husband-father to pay \$20 per week for alimony and child support. In 1955, when the said uniform reciprocal enforcement of support law was in force in both Connecticut and Florida, the wife-mother, residing in Connecticut, brought an action under said law to enforce the husband-father's duty of support decreed by said Volusia county divorce decree. The matter was referred to the cir-

cuit court of Duval county, Florida, which entered an order dismissing the petition. In reversing said order on appeal, the supreme court, among other things, said:

The appellant has a clear right to proceed under the 1955 Florida act to enforce the appellee's duty of support decreed by the Volusia county circuit court.
(Emphasis supplied.)

The uniform reciprocal enforcement of support law was intended to provide a simplified two-state procedure by which the obligor's duty to support an obligee residing in another state may be enforced expeditiously and with a minimum of expense to the obligee (or to the state, if the obligee is indigent). It contemplates that the court of the initiating state will refer the petition to the court of the responding state having jurisdiction of the obligor or his property. *It is intended to provide remedies to the obligee "in addition to and not in substitution for any other remedies,"* §88.041, Fla. Stat. 1955, F.S.A. It takes cognizance of the fact that the duty of support may arise out of a divorce or separate maintenance decree entered by another court and provides that "Any order of support issued by a court of this state when acting as a responding state shall not supersede any previous order of support issued in a divorce or separate maintenance action, but the amounts for a particular period paid pursuant to either order shall be credited against amounts accruing or accrued for the same period under both." §88.281, Fla. Stat. 1955, F.S.A. (Emphasis supplied.)

Since by its terms the act is designed to provide a remedy entirely separate from and independent of any remedies existing under other applicable provisions of law, we have no difficulty in holding that the circuit court of Duval county, the place of the appellee-obligor's residence, had jurisdiction of the proceedings. . . . (Emphasis supplied.)

It is true that in the Thompson case, the divorce decree which required the support payments was rendered in one county of Florida and the husband-father resided in another county of Florida when the action was brought against him under the uniform reciprocal enforcement of support law, while your inquiry is directed to a situation in which the husband-father still resides in the same Florida county in which the divorce decree requiring the support payments was entered. I think that, despite this factual difference, the above-quoted statements made by the supreme court in the Thompson case are equally applicable to the facts recited in question one.

My conclusion is that question 1 is properly answered in the affirmative and question 2 in the negative.

062-65—May 9, 1962

TAXATION

EXEMPTIONS—RELIGIOUS AND CHARITABLE INSTITUTIONS—INVESTMENT OF SURPLUS—§192.06(3), F. S.; §1, ART. IX, §16, ART. XVI, STATE CONST.

To: Ray E. Green, Comptroller, Tallahassee

QUESTION:

May funds derived from the rental of not more than 75% of the floor space of buildings belonging to educational, literary, benevolent, fraternal, charitable and scientific institutions in this state, as provided in §192.06(3), F. S., be invested in bonds and other securities pending the use of such funds for educational, literary, benevolent, fraternal, charitable and scientific purposes?

Section 192.06, F. S., exempts from taxation "such property of educational, literary, benevolent, fraternal, charitable and scientific institutions within this state as shall actually be occupied and used by them for the purposes for which they have or may be organized, provided not more than seventy-five per cent of floor space of said building or property is rented, and the rents, issues and profits of said property are used for the educational, literary, benevolent, fraternal, charitable or scientific purposes of said institutions" This statute was enacted pursuant to the constitutional authority vested in the legislature of this state by §1, Art. IX and §16, Art. XVI, State Const., which constitutional provisions limit tax exemptions, not otherwise provided by the constitution itself, to property held and used exclusively for municipal, educational, literary, scientific, religious and charitable purposes. These constitutional provisions have been held to be limitations "upon the power of the legislature to provide for the exemption from taxation of any classes of property except those particularly mentioned classes specified in the organic law itself." (*L. Maxcy, Inc. v. Fed. Land Bank*, 111 Fla. 116, 150 So. 248, text 250; *State v. St. John*, 143 Fla. 544, 197 So. 131, text 134; *State v. Doss*, 146 Fla. 752, 2 So. 2d 303, text 304).

To be entitled to tax exemption the property of any educational, literary, benevolent, fraternal, charitable or scientific institution, without regard to the purposes of its incorporation, must be held and used exclusively for one or more of the purposes mentioned in said §1, Art. IX and §16, Art. XVI, State Const., tax exemptions of such institutions being so limited by the constitutional provisions. In *Simpson v. Bohon*, 159 Fla. 280, 31 So. 2d 406, an Elks club owned a lodge building, a portion of which, less than 75% of the floor space thereof, was rented to tenants, a part of the income from such rentals being used for operational expenses, another part to pay off a mortgage encumbering the said property, another part to pay taxes, and the remainder invested in government bonds. The court held that the portion of the income so used to pay off the mortgage indebtedness was not used for any of the purposes mentioned in the above-mentioned constitutional provisions. It also, in denying tax exemption for the building in question, remarked that "the stern fact is that not one dollar of this huge sum found its way into the charity fund." It seems evident from the opinion of this case that no showing was made that any part of the

funds, including that invested in government bonds, was destined for any of the purposes mentioned in the above constitutional provisions.

We find nothing in the constitution, statutes or laws of this state prohibiting the investment of funds destined and allocated, or to be allocated, to municipal, educational, literary, scientific, religious or charitable purposes, in bonds and other securities pending the time they will actually be used for such purposes. The question of whether such funds are in truth and in fact destined and allocated or to be allocated, for one or more of the purposes mentioned in the constitution is largely a question of fact to be determined by the tax assessor from evidence and proofs furnished him by the institution holding such funds.

062-66—May 9, 1962

LICENSE TAXES

LIQUEFIED PETROLEUM GAS—LICENSE FEES—OUT-OF-STATE MANUFACTURERS—§§527.01 AND 527.02, CH. 527, F. S.

To: *J. Edwin Larson, State Treasurer and Insurance Commissioner, Tallahassee*

QUESTIONS:

1. Is an out-of-state manufacturer of liquefied petroleum gas tanks, who sells directly to the ultimate consumer or to a dealer in Florida, required to obtain a license under §527.01(8), F. S.?
2. Is an out-of-state manufacturer of liquefied petroleum gas tanks, apparatus, appliances or equipment, who sells directly to (a) the ultimate consumer or to (b) a dealer in Florida, required to obtain a license under the provisions of §527.01(4), F. S.?

Chapter 527, F. S., regulates the sale of liquefied petroleum gas and those persons engaging in certain activities in connection with such sale (§527.01, F. S.). The statutes were apparently enacted as a police measure intended for the protection of the public. (AGO 058-111, 1957-58 biennial report of the attorney general, pp. 619-620; see also 33 Am. Jur., Licenses, §25, note 13.)

Section 527.02(1), F. S., requires certain persons, as defined in §527.01, F. S., to first obtain from the state fire marshal a license to engage in one or more of those businesses set forth in said section. Certain fees are prescribed for the said licenses which fees would appear to be in the nature of a regulatory tax as distinguished from occupational license fees. (See AGO 051-213, 1951-52 biennial report of the attorney general, pp. 322-323.) It should be noted that the comments expressed by my predecessor in AGO 047-342 and 047-348, 1947-48 biennial report of the attorney general, pp. 259 and 486, respectively, regarding the character of such fees; i.e., revenue producing, are hereby superseded by the foregoing.

AS TO QUESTION 1:

Section 527.02(1), F. S., requires a "manufacturer of appliances and equipment for use of liquefied petroleum gas" to obtain a license to engage in such business in this state. Section 527.01(08), F. S., defines the foregoing phrase as follows:

(8) MANUFACTURER OF APPLIANCES AND

EQUIPMENT FOR THE USE OF LIQUEFIED PETROLEUM GAS.—Any person manufacturing and offering for sale or selling *in this state* tanks, cylinders or other containers and necessary appurtenances thereof for use by dealers in liquefied petroleum gas in their storage, transportation or delivery of such gas to ultimate consumers thereof; and apparatus, appliances and equipment for use by the ultimate consumer for storing and converting liquefied petroleum gas into flame for light, heat or power. (Emphasis supplied.)

The foregoing definition, as well as the language appearing in §527.02(1), applies only to those persons *manufacturing and offering* for sale or selling such equipment *in this state*. This definition would not embrace persons manufacturing appliances and equipment *in other states* although such persons may be offering for sale or selling such equipment in this state since the said definition contemplates the presence of two activities in this state; to wit, manufacturing *and* offering for sale or selling. (See AGO 053-21, 1953-54 biennial report of the attorney general, p. 535; see also AGO 051-384, 1951-52 biennial report of the attorney general, pp. 610, 611.)

Your question is, therefore, answered in the negative.

AS TO QUESTION 2:

Section 527.02(1), F. S., requires a "dealer in appliances and equipment for use of liquefied petroleum gas" to obtain a license from the state fire marshal before engaging in such business in this state. The foregoing quoted language is defined in §527.01(4), F. S., as follows:

(4) **DEALER IN APPLIANCES FOR USE OF LIQUEFIED PETROLEUM GAS.**—Any person selling or offering to sell, leasing or offering to lease, the apparatus, appliances and equipment necessary for the storage or converting of liquefied petroleum gas into flame for light, heat and power.

In regard to part (a) of this question dealing with a sale directly to the ultimate consumer, the activities of an out-of-state manufacturer, in selling or offering to sell directly to the ultimate consumer, would fall within the language appearing in §527.01(4). Such out-of-state manufacturer would then be a dealer within the contemplation of §527.01(4), F. S., and would be required to obtain a dealer's license before engaging in such activities in this state. Part (a) of this question is, therefore, answered in the affirmative.

In regard to part (b) of question 2, an out-of-state manufacturer, in selling directly to a dealer as defined above, would, in such instance, not be considered to be a dealer since the person to whom he is selling would be the "dealer" referred to in §527.01(4). Such out-of-state manufacturer might possibly be considered, in such instance, to be a distributor, for which activity no license appears to be required. In this regard, I stated in AGO 053-21, cited above, as follows:

On the other hand, where such persons manufacture such appliances and equipment in other states and engage in the wholesale distribution thereof in this state through distributors thereof to dealers in such appliances and equipment, as defined in §526.12(4), or to dealers in liquefied petroleum gas, *for sale by them in this state to ultimate*

consumers, such manufacturers and wholesale distributors, under a reasonable construction of the definitions here discussed, are not required to be licensed as dealers in such appliances and equipment, within the purview of §§526.12-526.20, F. S. (§§526.12-526.22, F. S., were transferred to Ch. 527, F. S., in 1961.) Part (b), therefore, is answered in the negative.

I trust that the foregoing comments satisfactorily answer your questions.

062-67—May 10, 1962

PARENT-CHILD

WITHHOLDING SUPPORT—CRIMINAL PROSECUTION, JURISDICTION—§§828.04, 856.04, F. S.

To: A. Z. Adkins, Jr., County Solicitor, Gainesville

QUESTION:

Does the court of record of Alachua county have jurisdiction to try John Doe for violation of §828.04, or should Mary Doe file a petition for rule to show cause before the circuit court that entered the final decree?

Section 828.04, F. S., makes it a misdemeanor for anyone to willfully, unlawfully or negligently deprive of necessary food, clothing or shelter any person under the age of 16 years, or for any person to deprive his child of necessary sustenance or raiment. Section 856.04, F. S., makes it a felony for a man to willfully withhold the means of support from his child. I am inclined to the view that any prosecution based on the above-recounted facts should be brought under §856.04 rather than under §828.04. However, even though I doubt the applicability of §828.04, I shall treat it as applicable solely for the purposes of this opinion.

In AGO 058-85, I expressed the opinion that the existence of a support decree does not divest the criminal courts of their jurisdiction and that the existence of such a decree cannot prevent a prosecution for any violation of §856.04. My opinions 049-176 and 050-311 were to the same effect. I see no reason why the same rule should not apply to a prosecution under §828.04.

While your letter states that you are cognizant of my said opinions, you call to my attention the last sentence of §124, Courts, 8 Florida Juris. Said §124 deals with the manner in which the court which first obtains jurisdiction in a particular matter may enforce its jurisdictional priority and the last sentence of said section reads as follows:

And while ordinarily equity will not enjoin a criminal proceeding, if a plaintiff in equity attempts to resort to a *criminal proceeding to enforce against the defendant the same right which he is pursuing against him in the equity cause*, an injunction may be sought to restrain prosecution in the criminal case. (Emphasis supplied.)

There is nothing in said quoted matter which would authorize an injunction against the mother to restrain her from prosecuting the father. Said quoted matter states that “. . . if a plaintiff in equity attempts to resort to a criminal proceeding to enforce against the defendant the same right which he is pursuing against him in the equity cause, an injunction may be sought to restrain prosecu-

tion in the criminal case," but no such situation exists in your case, since the only possible right of the mother which could be enforced in the criminal prosecution is to have the father punished and she is not seeking to have him punished for contempt in the civil case; hence she is not resorting to a criminal proceeding to enforce the same, or any, right being pursued against him in the civil case. Moreover, although the mother signed the charging affidavit in the criminal case, the state is legally the plaintiff in that case, whereas the mother would be the plaintiff in a contempt proceeding in the civil case, and this difference in plaintiffs makes it doubtful that the rule of law laid down in the above quotation from Florida Jurisprudence would be applicable even if the mother had a contempt proceeding pending against the father.

Also, the only authority cited by Florida Jurisprudence for its said pronouncement is the case of *Gulf Theatres, Inc. v. State*, 182 So. 842, and a careful analysis of the opinion in that case in the light of the supreme court's subsequent explanation of its meaning in *Merry-Go-Round, Inc. v. State*, 186 So. 538, 540, leads to the conclusion that it has no application to your facts, because the mother is not seeking a contempt adjudication and because, even if she were, the plaintiffs in the civil and criminal cases would not be the same.

Furthermore, the general rule is that a father who willfully neglects or refuses to provide support for his children in compliance with a court decree is subject to prosecution for the statutory offense of neglecting or refusing to support. In discussing this point, 67 C.J.S. 832, *Parent and Child*, §93, says:

... With respect to the statutory offense of neglecting or refusing to support, although there is some authority which is apparently to the contrary, it is generally held that he may be charged with such statutory offense if he thereafter willfully neglects or refuses to provide such support in compliance with the decree,

And even if the father in your case had already been punished by the circuit court for contempt arising out of his failure to comply with that court's support order, that fact would not bar a prosecution of the father for the same act of withholding support. The rule on this point is laid down in *Wilson v. State*, 164 So. 846, 847-848, as follows:

It is too well settled to require any citation of authorities here that the punishment of conduct as a contempt of court will not bar the criminal prosecution of the accused for the substantive offense committed by such conduct. In fact, the plaintiff in error does not contend to the contrary.

The fact that Wilson was sentenced by the circuit judge to serve 90 days in jail for contempt of court by reason of the commission of the act here charged as a substantive criminal offense against him can have no weight with this court in determining the legality of his conviction, while it might appeal to the state board of pardons as a reason why he should not be required to serve an additional three years in prison for the commission of the same act.

As indicated above, I doubt that the father is subject to prosecution under §828.04. However, assuming without agreeing that said statute is applicable, it is my opinion that the court of record of Alachua county, which has jurisdiction to try misdemeanors, has jurisdiction to try the father for violating said statute, and that it is quite unnecessary for the mother to file a petition for a rule

against the father requiring him to show cause before the circuit court why he should not be punished for contempt.

062-68—May 10, 1962

HUSBAND AND WIFE

CONSTRUCTION OF TERM "CLANDESTINE MARRIAGE"— §795.01, F. S.

To: Emmett B. Anderson, Assistant State Attorney, Fort Myers

STATEMENT OF FACTS:

The defendant, age 18, left Fort Myers with a female child, age 14, and transported her to Georgia for the purpose of effecting a marriage in that state. The female child left the home of her parents without their consent and knowledge. The marriage was effected in Georgia, fulfilling all conditions precedent for a valid marriage. The female child, however, did lie about her age for the purpose of securing a marriage license.

QUESTION:

Was the marriage contracted under the above-recited circumstances a "clandestine marriage" within the purview of §795.01, F. S.?

Section 795.01, F. S., reads as follows:

795.01 *Enticing away for clandestine marriage.*—Whoever fraudulently and deceitfully entices away any unmarried person under the age of 18 years from her father's house, or wherever else she may be found, without the consent of the parent or guardian, if any, under whose care and custody such person is living, *for the purpose of effecting a clandestine marriage* of such person without such consent, shall be punished by imprisonment in the state penitentiary not exceeding one year, or by fine not exceeding one thousand dollars. (Emphasis supplied.)

Except for amendments immaterial to the present discussion, said statute is the same as the statute with which the supreme court of Florida was concerned in *Hay v. State*, 67 So. 107. Involved in said case was the question of what constitutes a "clandestine marriage" within the contemplation of said statute. On this point, the supreme court said:

A clandestine marriage is (legally) one contracted without observing the conditions precedent prescribed by law, such as publication of bans, procuring a license, or the like. (Emphasis supplied.)

Since your above-quoted statement of facts says that a defendant took the female child to Georgia for the purpose of effecting a marriage in that state, and that the marriage was effected in Georgia, fulfilling all conditions precedent for a valid marriage, it is my opinion that the marriage was not a "clandestine marriage" within the above-quoted definition of that term set forth by the supreme court in the *Hay* case. I do not think that the fact that the girl lied about her age for the purpose of securing a marriage license brings the marriage within said definition.

Therefore, my conclusion is that your question is properly answered in the negative.

062-69—May 11, 1962

TAXATION

INTANGIBLE PERSONAL PROPERTY, EXEMPTIONS—CONSTRUCTION OF §199.02(5), F. S., CHURCHES ETC., §1, ART. IX, §16, ART. XVI, STATE CONST.; §192.06, F. S.

To: *Ray E. Green, Comptroller, Tallahassee*

QUESTION:

When is intangible personal property held and owned by churches and other nonprofit organizations having a tax situs in this state entitled to exemption from taxation?

Section 199.02, F. S. provides that "intangible personal property belonging to any religious, charitable, benevolent or educational association shall be exempt from taxation." This portion of the Florida Statutes appears to have been adopted under the authorization of §1, Art. IX, State Const., authorizing the Florida legislature to exempt from taxation "such property as may be exempted by law for municipal, education, literary, scientific, religious or charitable purposes." This section of the Florida constitution has been referred to by our supreme court as "a limitation upon the power of the legislature to provide for the exemption from taxation of any classes of property except those particularly mentioned classes specified in the organic law itself" (*L. Maxcy, Inc., v. Fed. Land Bank*, 111 Fla. 116, 150 So. 248, text 250; *State v. St. John*, 143 Fla. 544, 197 So. 131, text 134; *State v. Doss*, 146 Fla. 752, 2 So. 2d 304, text 304).

Under §16, Art. XVI, State Const., "the property of all corporations . . . shall be subject to taxation unless such property be held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes." In *Lummus v. Miami Beach Congregational Church*, 142 Fla. 657, 195 So. 607, text 608, the court remarked that "we have the conviction that the command to tax all corporate property needs no legislation to accomplish the result intended and that the exception 'unless . . . held and used exclusively for religious, etc. (scientific, municipal, educational, literary or charitable) purposes,' may likewise be availed of by the appellee without enabling action by the legislature . . ." See also *Fleischer Studios, Inc. v. Paxson*, 147 Fla. 100, 2 So. 2d 293, text 294. In *State v. St. John*, 143 Fla. 544, 197 So. 131, text 135, the court remarked that "the constitution expressly designates what property of corporations shall be exempt from taxation and of course the legislature is not empowered to add to or subtract from the clear and positive provisions of §16 of article XVI of the constitution."

From the above and foregoing it is imperative that the provision in §199.02(5), F. S., that "intangible personal property belonging to any religious, charitable, benevolent or educational association shall be exempt from taxation," be construed in the light of the limitation of said §1, Art. IX, and §16, Art. XVI, State Const. This being true, intangible personal property belonging to religious, charitable, benevolent or educational associations is exempt from ad valorem taxation only when held and used exclusively (see §192.06, F. S.) for religious, benevolent or charitable purposes as are also within the purview of said constitutional provisions. The rule is the same as applied to the real property owned and used by such associations.

The above seems to spell out the rule for determining when intangible personal property held and owned by churches and other nonprofit organizations having a tax situs in this state is entitled to exemption from ad valorem taxes.

062-70—May 16, 1962

TAXATION

APPORTIONMENT OF HOMESTEAD TAX EXEMPTION— APARTMENT OWNERS IN MULTIPLE UNIT APART- MENT BUILDING—§7, ART. X, STATE CONST.

To: Ray E. Green, Comptroller, Tallahassee

QUESTION:

Should apartments in a multi-unit apartment, not occupied as permanent homes by their owners, be taken into consideration in calculating the amount of homestead tax exemption to be allowed each owner-occupant of such apartments entitled to homestead tax exemption?

For example, where there are 25 apartments of equal value in a multi-unit apartment building in this state, each occupied by its owner, only 20 of such owners and occupants making their permanent home in their apartments, the other five not qualifying as permanent residents so as to be entitled to homestead tax exemption, should the exemption rights of each such owner be \$200 or \$250? Section 7, Art. X, State Const., provides in part that "said exemption may be apportioned among such of the owners as shall reside thereon, as their respective interests shall appear, but no such exemption of more than \$5,000 shall be allowed to any one person or to any one dwelling house, nor shall the amount of the exemption allowed any person exceed the proportionate assessed valuation based on the interest owned by such person. (Emphasis supplied.) Multiple unit apartment houses have been construed as being "one dwelling house" within the purview of the above quoted portion of §7, Art. X, State Const.

In *Overstreet v. Tubin*, Fla., 53 So. 2d 913, text 913, the court held that where a duplex dwelling house was owned by two owners, each owning outright his half of the duplex, only a total homestead tax exemption of \$5,000 may be allowed the duplex; here \$2,500 exemption was given each owner-occupant. In *Gautier v. Safra*, Fla. App. 3rd, 127 So. 2d 683, a four-dwelling unit, each apartment being separately owned by its occupant, was held to be entitled to only \$5,000 in exemption, the same to be divided among the said four owners, each getting a \$1,250 homestead tax exemption on his apartment.

We are, therefore, inclined to the view that the \$5,000 homestead tax exemption should be apportioned among those owner-occupants who qualify for the exemption, not among the apartments without regard to homestead tax exemption rights. Under the question posed in the first sentence following the question stated, the exemption would be \$250 per apartment, not \$200, provided the property interest equalled or exceeded said amount.

062-71—May 25, 1962

PUBLIC LANDS

DEEDS—EXECUTION, REQUIREMENTS—POWERS AND
DUTIES OF COMMISSIONER OF AGRICULTURE—§§570.14,
689.12, 19.16, FORMER §19.22, F. S.; §26, ART. IV, STATE
CONST.; CHS. 59-54, 59-229, LAWS OF FLORIDA

To: Doyle Conner, Commissioner of Agriculture, Tallahassee

QUESTION:

Does the commissioner of agriculture have authority under §570.14, F. S., to implement, by rule, regulation or other means, a use of the official seal of the department of agriculture that, when impressed upon them, will make operative and valid without witnesses deeds which convey lands sold by the state, by the board of education and by the board of trustees of the internal improvement fund, and all such deeds signed by the officers or trustees; and which will entitle such deed to record and be received in evidence in all the courts?

Your attention is directed to §689.12, F. S., which provides how state lands are conveyed by the state board of education and authorizes the use of the seal of the department of agriculture for the purposes indicated. Since this section appears to be authority for use of the seal of the department of agriculture for deeds and conveyances executed by the state board of education, it is not deemed that these instruments are of concern insofar as the question posed is applicable.

To properly answer the question raised in your letter, it is my feeling that the close and intimate relationship which the commissioner of agriculture has had with the land department and conveyances executed by the trustees of the internal improvement fund and the board of education since the early history of the state should be kept in mind to afford the proper basis for rendering a sound decision. Section 19.22, F. S., has been in effect since 1889. Chapter 59-54, the act which reorganized the department of agriculture, repealed §19.22, F. S., effective Jan. 15, 1961. In the same session of the legislature Ch. 59-229 was enacted into law, but §7 of this act used the following language insofar as the effective date of the act is concerned:

Section 7. This act shall become effective January 15, 1961, if prior to said date the electors of this state approve at the next general election held in November, 1960, or at a special general election held prior to that time that certain resolution amending §26, Art. IV, of the constitution, relating to the duties of the commissioner of agriculture.

Chapter 59-229, §1(8), authorized the trustees of the internal improvement fund to keep a seal, which seal when applied to deeds executed by the trustees would have the same effect as is provided in §19.22, F. S., for the seal of the department of agriculture. The legislature of 1959 did not pass resolution to submit an amendment to §26, Art. IV, State Const., to the electorate at any general election as provided for in §7; consequently, this act never became effective and is not a valid law.

Chapter 59-54 is now shown in the Florida Statutes as Ch. 570

and §570.14 is the section of this chapter which provides that the department shall have an official seal as suggested in your communication. We next turn our attention to the duties and responsibilities of the commissioner of agriculture as set forth in §26, Art. IV, a portion of which reads as follows:

Section 26. *Commissioner of agriculture, duties, etc.*—

The commissioner of agriculture shall perform such duties in relation to agriculture as may be prescribed by law; shall have supervision of all matters pertaining to the public lands under regulations prescribed by law, . . .

In §19.16, F. S., we find the following language in paragraph two:

19.16 *Duties as to information, conveyances and accounts, concerning public lands.* . . . He shall draw all deeds and conveyances and deliver the same for all sales and transfers, and other disposition of the public domain, that may from time to time be ordered and made by authority of law, and keep a true and faithful record of the same. He shall keep accounts of the several grants or donations for "fixing the seat of government," for "seminaries of learning," "for common schools," "for internal improvements," or for any other purpose, in separate books, accounts, and reports, so that the rights and interests of one shall not be blended or mixed with the rights and interests of another, and each class of land shall pay the expenses of locating the same.

The language used in this section constitutes a mandatory requirement that the commissioner of agriculture prepare all deeds and conveyances which apply to lands owned by the trustees and the board of education and in my opinion the commissioner of agriculture is clothed with all necessary power and authority to prepare these deeds and conveyances in such a manner as to comply with the statutory requirements for transfer of title from these public agencies and further that the deeds be prepared and executed so they will be entitled to be recorded in the public records of the appropriate county.

Since 1889, §19.22, F. S., has been the statutory authority whereby the use of the seal of the department of agriculture upon deeds and conveyances made by the trustees or board of education need no witnesses or acknowledgements to entitle these instruments to be recorded and to be received in evidence in all courts. Section 570.14, F. S., authorizes the department to have a seal and prescribes the purposes for which this seal shall be used and "for such other purposes as the commissioner may prescribe." This authority taken in conjunction with his constitutional authority and the responsibility imposed on him by §19.16, F. S., leads me to the conclusion that the commissioner of agriculture does have authority under these cited statutory and constitutional provisions to issue a directive which would authorize the use of the official seal of the department of agriculture for the same purposes accomplished by the provision of §19.22, F. S.

I trust this answers your question satisfactorily.

062-72—May 28, 1962

STATE EMPLOYEES

FLORIDA MERIT SYSTEM—EMPLOYMENT OR PAYMENT
 VIOLATIVE OF—DUTIES OF COMPTROLLER—CH. 110;
 §§110.01, 110.05(2), 17.03, F. S.; §23, ART. IV, STATE
 CONST.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

What are the duties of the comptroller of this state, if any, when a person is employed or compensated in violation of any statute, rule or regulation applicable to a merit system put in operation under or pursuant to Ch. 110, F. S.?

Chapter 110, F. S., creates "a merit system personnel administration covering the employees of the state board of health, the Florida industrial commission, the Florida crippled children's commission, the state and district welfare boards, the merit system council; the hospital planning division of the Florida development commission, and the employees of such other state agencies as the governor, or other constitutional officers, or the railroad and public utilities commission, may direct in accordance with the provisions of" said Ch. 110, F. S. (§110.01, F. S.). The above question concerns the agencies above mentioned or referred to and their employees.

"The unlimited authority of the chief executive in public office to appoint and remove all subordinate officials, which prevailed throughout this country during the first century of its existence, resulted in the general adoption of the 'spoils system' under which public office was made to be the reward for political work, with the resulting evils of inefficiency, extravagance, the interruption of public business by place hunters, corruption of the electoral franchise and political assessments." (10 Am. Jur. 921, §2.) The above language quoted from American Jurisprudence relative to officers seems equally applicable to public employees. *Civil service and merit system statutes and laws are designed to prevent the operation of the so-called spoils systems* and to require the selection of competent and capable public officers and employees for the administration and operation of the public boards, agencies and commissions mentioned in Ch. 110, F. S. "Civil service and merit system laws and statutes are designed to eradicate the system of making appointments primarily from political considerations with its attendant evils of inefficiency and *extravagance*, and in its place to establish a merit system of fitness and efficiency as the basis of appointments" or employment to public service. "Such laws substitute for the uncontrolled will of the appointing officer the results of competitive examinations. They require that appointments to office be made from among those who, by examination, have shown themselves to be best qualified . . ." (10 Am. Jur. 922, §2). The above statements from American Jurisprudence have the approval of the courts in *State v. Civil Service Com.*, 141 Conn. 465, 106 A. 2d 713, text 715; *Shanley v. Jankura*, 144 Conn. 694, 137 A. 2d 536, text 541; *Gray v. Jenkins*, 183 Kan. 251, 326 P. 2d 319, text 326; *Civil Service Com. v. Auditor*, 302 Mich. 673, 5 N. W. 2d 536, text 539; *Hawkes v. Unemployment Comp. Bd.*, 143 Pa. Super. 465, 21 A. 2d 485, text 488; *Keith v. Beasley*, 177 Tenn. 652, 152 S. W. 2d 618, text 619; *Knoxville v. Smith*, 176 Tenn. 73, 138 S. W. 2d 422, text 424.

Chapter 110, F. S., "is highly remedial, and should be liberally and favorably treated and construed with reference to the evils it was intended to curb, and the highly beneficent aims that inspired its adoption" (Heck v. Hall, 238 Ala. 274, 190 So. 280, text 283). Such merit system statutes, as well as civil service statutes, have generally been upheld by the courts. The merit system council, whose members are appointees of the state personnel board, has the duty, after public hearings "to recommend the adoption for consideration by the state personnel board, of rules and regulations effecting the merit system of personnel administration as contemplated by" Ch. 110, F. S.; such rules and regulations "shall include provision for the classification of positions, *the establishment of salary schedules and minimum personnel standards for the positions so classified and for periodic payroll audits of such positions*. Violations of any of the requirements of the said Ch. 110, F. S., or rules and regulations duly and regularly adopted pursuant thereto, constitute misdemeanors (§110.14, F. S.). Any provisions for the payment of salaries or other compensation to persons or employees within the merit system established under and pursuant to said Ch. 110, F. S., in excess of the "salary schedules" duly adopted pursuant to §110.05-(2), F. S., would seem to be violative of said Ch. 110, F. S., and illegal, provided, however, there be no contrary applicable statute or law, fixing an applicable salary in conflict with said salary schedule.

Section 23, Art. IV, State Const., provides that "the comptroller shall *examine, audit, adjust and settle* the accounts of all officers of the state and perform such other duties as may be prescribed by law. The requirements of §17.03, F. S., are substantially the same as those set out in said §23, Art. IV, State Const. The court, in *State v. Lee*, 150 Fla. 35, 7 So. 2d 110, text 113, construed said §23, Art. IV, as conferring upon the comptroller the right and imposing upon him the "duty to see to it that all disbursements of public moneys are authorized by a legal appropriation, and that the payment of a particular item violates no positive prohibition against payment, expressly or impliedly forbidden by law." See also *State v. Gay*, Fla., 46 So. 2d 711, text 714, and *State v. Lee*, 117 Fla. 779, 158 So. 461, text 465, to the same effect.

When it appears to the state comptroller that an employee or other person of a state board, commission, officer or agency, brought into the merit system provided by Ch. 110, F. S., is being employed or compensated in violation of merit system statutes or duly adopted rules and regulations, he may not issue and deliver a warrant, or payment of the claim of such person wrongfully employed or compensated, to such employee or other person, unless and until it shall satisfactory appear to said state comptroller that such payment is clearly authorized by some valid and applicable statute or law notwithstanding said Ch. 110, F. S., or rule or regulation of the merit system. In case of doubt the question should be resolved in favor of the application of the merit system statutes, rules and regulations.

062-73—May 28, 1962

COUNTY ORGANIZATION—OFFICERS—REGULATIONS

COUNTY DEPOSITORIES—SECURITIES REQUIRED—OBLIGATIONS OF EXPORT-IMPORT BANK—CH. 136, §§136.01, 136.02, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Are obligations issued by the Export-Import bank of Washington acceptable as securities under §136.02(4), F. S., by county depositories qualifying under Ch. 136, F. S.?

Under §136.01, F. S., "any bank, national or state, authorized to do business in this state which will, as to the various funds hereinafter referred to, offer satisfactory inducement as to security as herein provided is hereby created and designated a county depository" Under §136.02, F. S., "any bank as described in the foregoing section desiring to become a county depository as herein provided shall make satisfactory deposit with or to the credit of the comptroller of the state, of securities of the kind herein authorized approved by the comptroller and in an amount to be determined by the comptroller, conditioned that said bank insure the safekeeping, proper accounting for and payment over to the proper authority of all money that may come into its possession by virtue of its acting as said depository" It is further provided in and by said §136.02, that "the securities to be deposited by such banks desiring to qualify as a county depository hereunder, shall consist of bonds of the U. S., bonds the payment of whose principal and interest is guaranteed by the U. S., federal certificates of indebtedness ... (here are inserted a listing of state, municipal and local securities) (housing authority bonds) when such bonds or other obligations are secured by a pledge of annual contributions to be paid by the United States government or any agency thereof."

The Export-Import bank of Washington was first organized as a corporation of the District of Columbia around 1934, but was reincorporated as an agency of the U. S. by the act of June 9, 1947. Section 635, title 12, of the U. S. code, creates "a corporation with the name Export-Import bank of Washington, which shall be an agency of the U. S. The bank is authorized and empowered to do a general banking business, except that of circulation; to receive deposits; to purchase, discount, rediscount, sell and negotiate, with or without its endorsement or guaranty, and to guarantee notes, drafts, checks, bills of exchange, acceptances, including bankers' acceptances, cable transfers and other evidences of indebtedness; ... " The said Export-Import bank was organized with a "capital stock of \$1,000,000,000, subscribed by the U. S." The secretary of the treasury of the U. S. is authorized to "use as a public debt transaction the proceeds of any securities issued after July 31, 1945, under the second liberty bond act," in effecting payment of the obligation of the U. S. for the purchase of capital stock in the said bank. (§635b, title 12, U. S. code). "The Export-Import bank of Washington is authorized to issue from time to time, for purchase by the secretary of the treasury, its notes, debentures, bonds or other obligations; but the aggregate amount of such obligations

outstanding at any one time shall not exceed \$4,000,000,000 (§635d, title 12, U. S. code).

Under §635h, title 12, U. S. code, "any person, including any individual, partnership, corporation or association, may act for or participate with the Export-Import bank of Washington in any operation or transaction, or may acquire any obligation issued in connection with any operation or transaction, engaged in by the bank." Nowhere in the federal statutes do we find any provision making the obligations issued by the Export-Import bank of Washington bonds or other direct obligations of the U. S.; neither do we find any statute guaranteeing the payment of such obligations by the U. S. in case of default by the Export-Import bank of Washington. The obligations of the said bank appears to be corporate obligations and not direct obligations of the U. S.

These observations lead to a negative answer to the above stated question.

062-74—May 29, 1962

TAXATION

INTANGIBLE PERSONAL PROPERTY, SITUS FOR TAXATION—BUSINESS SITUS—INSURERS

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where are the bonds and other securities of an insurer, in which are invested its reserves and similar funds, subject to ad valorem taxation, when such insurer transacts business in all or in a majority of the several states of the U. S.?

This question arises relative to a fire and casualty insurer organized and incorporated under and pursuant to the statutes and laws of the state of Ohio, with its main or home corporate office in Dayton, Ohio, and duly and legally qualified to transact a fire and casualty insurance business in all, or substantially all, of the several states of the U. S. The corporate stock issued and outstanding by this fire and casualty insurer is wholly owned and held by a Florida life insurer. Under the insurance laws of Ohio provision is made for the investment of capital (§3925.05), additional investments (§3925.06), accumulated funds or surplus (§3925.08), and maybe of other funds, usually in bonds and other types of securities. These investments appear to represent the funds of such insurers reserved to meet their obligations, especially those arising under their insurance obligations. The question of the situs of these investments for the purpose of ad valorem taxation has been put in issue, as between Ohio, where the principal office of the corporation is located, and Florida, where an administrative office of the corporation is located.

We gather the impression from an examination of the Ohio statutes that the principal office of the insurer must be maintained in Ohio, although under said statutes directors meetings may be held within or without the state of Ohio. The code of regulations, or by-laws, of the corporation recognize a *home office* for the corporation in Dayton, Ohio and an *administrative office* in Jacksonville, Florida, and provide for meetings of the stockholders and directors at either of said offices. From the copy of the charter of the insurance company above referred to, on file in the office of the sec-

retary of state of Florida, we find that the principal office of the said insurer is located at Dayton, Ohio. From purported correspondence with the superintendent of insurance of Ohio, insurance companies, such as the one herein considered, "must remain in Ohio so long as it is a domestic corporation and it must maintain corporate records such as minutes of the regular and special meetings of the stockholders, directors and other committees, stock records and securities among other things in Ohio at all times On this basis, we would consider it an infraction of the law if it (the insurer) were to transfer its securities out of Ohio, except in those cases where it is required through state regulations to make a reasonable deposit with the regulatory official of another state in order to do business therein." These facts raise the question of the situs of the securities above mentioned, for the purposes of taxation as between the states of Ohio and Florida.

Doubtless the insurer in question maintains organizations in each of the states in which it does business, other than Ohio, sufficient to enable it to issue insurance policies, process claims and pay those found to be binding obligations of the insurer. The taxing power of a state is limited to persons and property within, and subject to, its jurisdiction, since its laws cannot operate beyond its jurisdictional limits, its taxing power being limited to persons and property within, and subject to, its jurisdiction, (84 C. J. S. 61 and 62, §11). Subject to the rule of business situs, the maxim of "*mobilia sequuntur personam*" (movables follow the person) is applied to intangibles, as to the taxation thereof, fixing their situs for ad valorem taxation at the domicile of their owner (30 Fla. Jur. 556, §127; 84 C. J. S. 230, et seq. §116; 51 Am. Jur. 474 and 475, §463). This being true where a foreign corporation comes into this state and obtains a license, under applicable statutes, to transact business in this state, its intangible personal property will be taxable in the state of its domicile, unless such intangible personal property, or some part thereof, has acquired a *business situs* in this state sufficient to give this state jurisdiction over such intangible personal property, or some part thereof.

We are here primarily concerned with the establishment in this state of a business situs for such intangibles or some part thereof. "All subjects over which the sovereign power of a state extends, are objects of taxation; but those over which it does not extend are, upon the soundest principles, exempt from taxation" (Curry v. McCanless, 307 U. S. 357, text 366, 59 S. Ct. 900, 83 L. ed. 1339, text 1347). It has been stated that intangible personal property, being without physical characteristics, can have no location in space; so that resort to a fiction of location must be resorted to for purposes of taxation (First Bank Stock Corp. v. Minn., 301 U. S. 234, text 240, 57 S. Ct. 677, 81 L. ed. 1061, text 1065). "When we deal with intangible property . . . we encounter the difficulty that by reason of the absence of physical characteristics they have no situs in the physical sense, but have the situs attributable to them in legal conception." (Wheeling Steel Corp. v. Fox, 298 U. S. 193, text 209, 56 S. Ct. 773, 81 L. ed. 1143, text 1147). See also State v. Beardsley, 77 Fla. 803, 82 So. 794; Wood v. Ford, 148 Fla. 66, 3 So. 2d 490, text 495 and 496; State v. Gay, 160 Fla. 445, 35 So. 2d 403, text 408.

In Smith v. Lummus, 149 Fla. 660, 6 So. 2d 625, text 628, the court remarked "it seems to us from our study of the authorities that the exception to the rule that the tax on intangible personal

property should be levied at the domicile of the owners, arises in those cases where, *because of activity in another state involving the property*, they receive such benefits and protection under the laws of that state that they should make contributions to its government." (Emphasis supplied.) In *Smith v. Lummus*, supra, the court referring to *Curry v. McCanless*, supra, quoted therefrom with approval that "the taxpayer who is domiciled in one state but carries on business in another is subject to a tax there *measured by the value of the intangibles used in his business*." (Emphasis supplied.) In 51 Am. Jur. 479, §468, the statement is made that "it is generally recognized that there may be a 'business situs' in a state other than the domicile of the owner or creditor *in the case of intangibles used in such other state in the local business of their non-resident owner*, which will enable that state to exact a property tax *measured by the value of the intangibles used there*." (Emphasis supplied.) In 51 Am. Jur. 480, §469, it is stated that the doctrine "business situs" "is ordinarily formulated so as to limit its application to cases where *the possession and control of the property rights have been located in some independent business or investment away from the owner's domicile*, so that its substantial use and value primarily attach to and become an asset of the outside business." (Emphasis supplied.)

In 84 C. J. S. 235 and 236, §116, the author concludes from the authorities considered that "while it has been held that it is impossible to frame an accurate formula which will include every case properly subject to the operation of the rule of 'business situs,' and exclude every case legally beyond its operation, as *each case is largely dependent on its own facts*, the term 'business situs' has been defined as a situs in a place other than the domicile of the owner, where such owner, through an agent, manager, or the like, is conducting a business out of which credits or open accounts grow and are used as a part of the business of the agency, and the courts have laid down certain conditions which ordinarily should exist in order that intangibles may have a business situs apart from the domicile of the owner. Thus, the necessity for *some business use of the intangibles involved* or some authority to manage, control, or deal with them in a business may in the state in which, it is claimed, a business situs exists, has been asserted or recognized, as has the necessity that the business should *have more or less independent status*, and in this latter connection it has been laid down that *the possession and control of the property right must be localized in some independent business or investment away from the owner's domicile*, so that the substantial use and value of such property right primarily attach to, and become an asset of, the outside business; in other words, while the nonresident may own the business, the business controls and utilizes in its operation and maintenance the credits and income thereof. So, also, there should usually be some degree of permanency of location of the credits or obligations involved and of continuity of the business or transactions affecting or giving rise to such credits or obligations, as distinguished from a mere temporary business or isolated transaction, and, thus, a mere temporary presence of the intangible property in question, or of the evidence thereof, for a particular purpose, mere presence for safekeeping, or a single or isolated transaction, is not sufficient." (Emphasis supplied.)

In *Holly Sugar Corp. v. McColgan*, 18 Cal. 2d 218, 115 P. 2d 8,

text 10 and 11, the supreme court of California, discussing the question of the business situs of intangible personal property, said that, "It is well settled that stocks, bonds and other intangible property have a taxable situs, under the fiction of *mobilia sequuntur personam, at the domicile of the owner* . . . The stockholder, is not the owner of the property of the corporation, and the state which has jurisdiction of any of the corporate property has not pro tanto jurisdiction of his shares of stock The shareholder becomes the owner of the corporate property and earnings only upon the corporation's declaration of dividends or liquidation, and the resulting gain or loss for the shareholder has its source in the stock, which by reason of identity or association with the person of the owner, has its situs at his domicile As an exception to the general rule embodied in the legal maxim *mobilia sequuntur personam*, it is equally well settled that intangible property may acquire a situs from taxation other than at the domicile of the owner if it has become *an integral part of some local business* Business situs arises from the act of the owner of the intangibles in employing the wealth represented thereby, *as an integral portion* of the business activity of the particular place, so that it becomes identified with the economic structure of that place and loses its identity with the domicile of the owner" There must be "something like a general, or more or less continuous, course of business or series of transactions within the state where the property is physically located as distinguished from mere sporadic and isolated transactions."

In *Smith v. Lummus*, 149 Fla. 660, 6 So. 2d 625, text 627, the court, citing *Cooley on Taxation*, 3rd Ed., p. 89, stated that the "power of the state to tax does not 'as a general rule extend to the intangible personal property of a nonresident, for such property must ordinarily be regarded as having its situs at the domicile of its owner,' " and further (text 628) "that the exception to the rule that the tax on intangible personal property should be levied at the domicile of the owners arises in those cases there, *because of activity in another state involving the property, they receive such benefits and protection under the laws of that state that they should make a contribution to its government.*" (Emphasis supplied.)

The author of the annotation appearing in 143 A. L. R., at pp. 361, et seq., from the cases cited on pp. 367-375 of said annotation, concludes that "in a number of decisions, mostly of recent origin, the courts have used, as a test for the legal existence of a business situs of intangible property for the purposes of property taxation in a state other than the domicile of the owner, the concept of '*localization*' of intangibles and their '*integration*' with some local business in the state. Instead of holding one particular outstanding fact or circumstance as an indispensable condition of such a situs, it is necessary under the 'integration doctrine', in order to authorize taxation, that the intangibles *have become an integral part of some business activity, and that their possession and control be localized* in some independent or investment away from the owner's domicile, so that their substantial use and value primarily attach to and become an asset of the outside business, or, in other words, that the local independent business controls and utilizes, in its own operation and maintenance, the intangible property and its income." (Emphasis supplied.)

A business situs arises when the possession and control of intangibles of a nonresident are localized in some independent business

or investment away from the owner's domicile, so that its substantial use and value attaches to and becomes an asset of the locally operated business away from the owner's domicile (*State v. Atlantic Oil Producing Co.*, 174 Okla. 61, 49 P. 2d 534, text 538; *Graves v. State*, 168 Okla. 642, 35 P. 2d 454, text 456; *Mecklenburg County v. Sterchi Bros. Store*, 210 N. C. 79, 185 S. E. 454, text 457 and 459; *Tax Com. v. Kelly-Springfield Tire Co.*, 38 Ohio App. 109, 175 N. E. 700, text 704; *Chestnut Sec. Co. v. Tax Com.*, 174 Okla. 71, 49 P. 2d 534, text 538; *Crane Co. v. Des Moines*, 208 Iowa 164, 225 N. W. 344, text 345.) Although certain open accounts, notes, mortgages, and other like and similar intangibles were subject to taxation in a state other than that of the domicile of the owner, because resulting from business operations in said state, other bonds and securities of the nonresident owner, having no connection with said business operation were held to have no sufficient situs in such state as would permit their taxation therein (*Manufacturers Trust Co. v. Hackett*, 118 Conn. 101, 170 A. 792, text 793). In *Holly Sugar Corp. v. McColgan*, *supra*, a foreign corporation acquired a majority of the outstanding stock of a domestic corporation; this was held insufficient to show a business situs in the state for the foreign corporation; an integration of the business operations appears to have been deemed necessary for a business situs.

In most instances, and in most states, insurers are required to maintain financial reserves for the protection of their policyholders and beneficiaries therein. These financial reserves are usually invested in stocks, bonds and other types of securities. Although the deposit with some specified state officer of securities is required in most cases when a foreign insurer qualifies to do an insurance business in a state, such resources are held either for the benefit of policyholders of such state, or for the benefit of policyholders generally, or otherwise as may be specified by the applicable statute. The reserves of the insurer, other than specifically required to qualify an insurer to do business in a state, are usually held and administered for the benefit of policyholders generally and not those of a specific state or location. Generally such reserve funds are administered from the home office of the insured, and not from some local or suboffice of the insurer; although there may be exceptions to this conclusion. A foreign insurer may acquire a business situs in a foreign state generally, or for some specific and definite purpose local in application, depending on circumstances and applicable facts. Most corporate statutes and laws of this day and time contain provisions permitting the boards of directors of their corporations to meet either within or without the state of incorporation; this was never intended to have the effect of changing the home office of the corporation every time the board of directors held a meeting in a different place.

Before corporate reserves, invested in stock, bonds, and other securities, may be said to have a business situs in a state other than the one where the corporation's principal place of business is located, they must have acquired a business situs, as above discussed, in such state away from that wherein its principal place of business may be located. Such stocks, bonds or other securities must have been by action of the board of directors or other governing body, localized and integrated with the local business in the state. The fact that the insurer may maintain an administrative or executive office in this state, away from its home office in another

state, is not of itself sufficient to show a business situs in this state.

The answer to the above stated question depends upon the facts and circumstances surrounding the situs of the bonds, stocks and other securities of the insurer, for the purposes of taxation. The presumption is that they are taxable at the domicile or home office of the insurer. This presumption must be overcome by competent evidence, before such stocks, bonds and other securities may be taxed in Florida. Unless the said stocks, bonds and other securities have been so used as to become a part of the company business carried on in Florida, they are not subject to taxation in Florida. The holding of stockholders' and directors' meetings in Florida is not of itself sufficient to show that the insurer's reserves, etc., invested in stocks, bonds and other securities, have been made a part of the business done in Florida, or have become an integral part of the Florida business. Before such stocks, bonds and other securities may be taxed in Florida they must have been made and become an integral part of the insurer's business in Florida.

No all inclusive answer may be given to the question posed above; the question is to be answered from a consideration of all the applicable facts and circumstances, and the application of the conclusion to be drawn from such facts and circumstances to the rules above discussed. In short, it must be determined that such stocks, bonds and securities have been integrated into and become a part of the business transacted in Florida. The fact that the insurer may transact an insurance business in Florida is not of itself sufficient evidence that the stocks, bonds and securities in question have acquired a business situs in Florida; it must be shown that the said stocks, bonds or securities, or some portion thereof, have been integrated into the business done in Florida.

The above and foregoing outlines the general rules for determining the taxable situs of stocks, bonds and other securities of an insurer. However, we are specifically concerned with certain stocks, bonds and other securities held by the Reliable Insurance Co., an Ohio corporation, with its principal place of business in Dayton, Ohio. We are advised that the superintendent of insurance of Ohio has advised that "the Reliable Insurance Company, Dayton, Ohio, is a domestic fire and casualty company insured under the laws of Ohio and maintaining its corporate office at Dayton, Ohio. The corporate office of the insurance company must remain in Ohio so long as it is a domestic corporation and it must maintain corporate records such as minutes of the regular and special meetings of stockholders, directors and other committees, stock records and securities among other things in Ohio at all times. The company is examined periodically and it is required of the superintendent of insurance to take the necessary steps to see that these records are maintained in Ohio. On this basis, we would consider it an infraction of the law if the Reliable Insurance Co., of Dayton, Ohio, were to transfer its securities out of Ohio, except in those cases where it is required through state regulations to make a reasonable deposit with the regulatory official of another state in order to do business therein." These observations by the superintendent of insurance of Ohio, express the view that the situs of stocks, bonds and other securities of Ohio insurers have a statutory situs in Ohio, except when deposited with state insurance departments of other states as a condition to transacting an insurance business in such other states, and that such situs may not be legally changed to another state so long as the insurer

remains an Ohio corporation. Under these Ohio statutory provisions mentioned by the superintendent of insurance the statutory situs of the stocks, bonds and other securities of the said Reliable Insurance Co. remain in Ohio, so long as said stocks, bonds and securities physically remain in Ohio. This paragraph is limited to stocks, bonds and other securities of the insurer and should not be applied to other properties.

062-75—June 1, 1962

TAXATION

DOCUMENTARY STAMP TAXES—CORPORATE STOCK TRANSACTIONS—NOMINEES, ETC.—§§201.04, 201.09, 201.10, 201.21, 614.03, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. Is a transfer of corporate stock from a corporation, or from its customer, to a nominee, or from the nominee to the corporation or its customer, subject to documentary stamp taxes?

2. Is the transfer of corporate stock from a charitable institution to a nominee, or from the nominee to the said institution, subject to documentary stamp taxes?

3. When a stock certificate is delivered to a stockbroker endorsed in blank or to the said broker, is such transfer subject to documentary stamp taxes?

These questions seem to involve §201.04, F. S., which imposes documentary stamp taxes "on all sales, agreements to sell, or memoranda of sales or deliveries of, transfers of legal title to shares, or certificates of stock or profits or interests in property or accumulations in any corporation, or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefits of such stock interests or rights or not" These provisions of said §201.04, F. S., are substantially identical, and appear to have been taken from item 3, schedule A, title VIII, of both the federal revenue act of 1924 and the federal revenue act of 1926, which imposed documentary stamp taxes "on all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to shares or certificates of stock or of profits or of interest in property or accumulations in any corporation, whether made upon or shown by the books of the corporation, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale, whether entitling the holder in any manner to the benefit of such stock, interest, or rights, or not" The Florida statute was clearly taken from or patterned after the federal statute on the same subject.

Section 201.04, F. S., was derived from §1, Ch. 15787, 1931, which levied and imposed a tax on documents to raise revenue for the support of the state government. The supreme court of Florida held that where a Florida statute was taken from, or is substantially the same as, a federal statute on the same subject matter, such

Florida statute should receive the same construction in the Florida courts as is given to the federal statute in the federal courts (*Gay v. Inter-County Tel. and Tel. Co., Fla.*, 60 So. 2d 22, text 23; *State v. Cook*, 108 Fla. 157, 146 So. 223, text 224; *State v. Atkinson*, 108 Fla. 325, 146 So. 581, text 582; *Kidd v. Jacksonville*, 97 Fla. 297, 120 So. 556, text 559). This Florida statute remained without material change until the adoption of §1, Ch. 61-270, when the base for taxing no-par value stock was changed; however, in no way affecting the construction of the statute here under consideration.

In 1937 the supreme court of the U. S., in *Founders Corp. v. Hoey*, 300 U. S. 268, 57 S. Ct. 457, 81 L. ed. 639, construed the above quoted provisions of the federal revenue acts of 1924 and 1926 as imposing a documentary stamp tax upon stock transfers to and from nominees. The court stated "especially indicative of congressional intention that nominee transactions generally should be subject to the tax are the provisions added by the revenue act of 1932 . . . which exempt certain specifically designed transfers to nominees." This opinion was rendered in 1937; congress, in its 1939 revenue code, extended the 1932 exemption of transactions with nominees. These federal exemptions, together with any other extensions in this connection, now appear as §4342, title 26, of the federal revenue code of 1954. These exemptions of transactions with nominees from the federal documentary stamp taxing statutes, clearly indicate an intention to exempt such transactions from those taxed under the 1924 and 1926 federal internal revenue codes.

Question 1 is answered in the affirmative in the light of the federal court's construction of the federal statute from which was taken the Florida statutes here considered. Although the federal statute has been amended to exempt from taxation many transactions with nominees, the Florida statute has not been so amended.

Section 201.04, F. S., is applicable to transactions between charitable or like foundations and organizations, unless exempted therefrom by some applicable Florida statute or constitutional provision. In *Plymouth Citrus Growers Ass'n v. Lee*, 157 Fla. 893, 27 So. 2d 415, text 416, the court said that Florida's "documentary stamp tax is an excise tax on the promise to pay," when within §201.08, F. S.; the document involved in this case was a promissory note. In *Graniteville Mfg. Co. v. Query*, 283 U. S. 376, 51 S. Ct. 515, 75 L. ed. 1126, text 1128, the court had under consideration a documentary stamp tax similar to the Florida statute, which tax is referred to as "an excise tax of a familiar sort." In 49 Am. Jur. 206 §2, the statement is made that documentary stamp taxes "are ordinarily in the nature of excise taxes rather than direct taxes." "An excise tax is any tax which does not fall within the classification of a poll tax or a property tax." (*Gaulden v. Kirk, Fla.*, 47 So. 2d 567, text 572). In *State v. Lee*, 122 Fla. 639, 166 So. 249, text 254, the court remarked that "under the Florida decisions a privilege tax is an excise tax and is authorized by §5, Art. IX, of the constitution as a license tax." The documentary stamp taxes imposed by §201.04, F. S., are excise taxes imposed under the authority of §5, Art. IX, State Const., and are not property taxes under §1, Art. IX, and §16, Art. XVI, of said constitution. This being true, the provisions of said §1, Art. IX, and §16, Art. XVI, for exemption from taxation have no application to the excise taxes imposed under and pursuant to said §5, Art. IX, State Const. (See *Miami Beach College Corp. v. Tomlinson*, 143 Fla. 57, 196 So. 608; *Orange State Oil Co. v.*

Amos, 100 Fla. 884, 130 So. 707, text 709; West Palm Beach v. Amos, 100 Fla. 891, 130 So. 710, text 712.

"In general exemptions from license, sales, privilege or occupation, use or other excise taxes will not be implied or presumed; but must be expressed in clear and unambiguous language, or must appear by necessary implication from the language used, and will not be deduced from language of doubtful import or which gives rise to just controversy as to the legislative intent. They are not allowed save as defined in the constitution, statute or ordinance granting them . . . (53 C. J. S. 603, §31). Any person claiming exemption from a license or excise tax imposed by the legislature is required to show that he is entitled to the claimed exemption, "and the law is strictly construed as against the person claiming the exemption and in favor of the public." (see Robinson v. Fix, 113 Fla. 151, 151 So. 512; Harper v. England, 124 Fla. 296, 168 So. 403, text 406; 33 Am. Jur. 363, §38). Although Ch. 201, F. S., exempts renewal notes, certificates of deposit issued by banks, and certain collateral obligations (§§201.09, 201.10 and 201.21, F. S.), we find no statutory or constitutional exemption from documentary stamp taxes of transfer of stock and stock certificates from or to charitable institutions and foundations. Question 2 is answered in the affirmative.

Question 3 poses the legal effect of an endorsement in blank and delivery of certificates of stock by their owner to a stockbroker, for the purpose of the sale and delivery of such stock to a purchaser. The statement is made in 12 C. J. S. 30, §11, that "in the execution of his client's orders for the purchase or sale of stock a stockbroker is ordinarily the client's agent, especially where the transaction is to be a cash one; and this relationship is not converted, as a matter of law, into that of seller and purchaser by a formal confirmation of a sale, or by the broker's retention of the difference between the authorized sales price and the increased amount at which certificates were sold." In 8 Am. Jur. 997, §14, it is stated that the "essential and basic feature underlying the relation of a broker to his employer is that of agency, and the principles of law applicable to principal and agent govern their respective rights and liabilities throughout." In 8 Am. Jur. 997 and 998, §15, it is stated that "the prevailing view is that the relation between a stockbroker and his customer is a fiduciary one. Thus, when a customer delivers securities to a stockbroker for sale or exchange, it is generally held that the relation created is one of agency or bailment, or at least is one of a fiduciary nature, and not one of debtor and creditor, although there is no fiduciary relation between a broker who has charge of selling stock and a purchaser from him." The statement is made in 8 Am. Jur. 1049, §110, that "the general rule is that the title to securities purchased by a stockbroker vests immediately in the customer, whether the purchaser is on margin or otherwise." In 12 C. J. S. 30, §11, it is stated that "in the execution of his client's orders for the purchase or sale of stock a stockbroker is ordinarily the client's agent, especially where the transaction is a cash one." Generally, a broker, in buying or selling stock, grain, etc., has such authority only as is conferred by his contract of employment or the instructions of his principal. (12 C. J. S. 64, §21).

Under §614.03, F. S., the title to corporate stock may be transferred "by delivery of the certificate endorsed either in blank or to a specified person." Other methods of transfer are also provided in and by said section. The uniform act controls "although the charter

or articles of incorporation, or code of regulations or bylaws, seem to control." We gather from the opinion in *Lee v. Bickell*, 292 U. S. 415, 54 S. Ct. 727, 78 L. ed. 1337, that the usual procedure followed is for the stockbroker, when he receives an order to sell or purchase specified shares of stock for a client, is to advise a representative on the stock exchange to buy or sell the specified shares of stock, whereupon, such stock is offered for sale on the said stock exchange. When the purchase or sell order is executed, the stockbroker and his client are advised. When so advised the owner and holder of the certificate representing the shares of stock so sold endorses the same in blank or to some specified person, and delivers the same to the stockbroker who makes delivery thereof, or causes the same to be delivered, to the purchaser. Under §614.03, F. S., title to shares of corporate stock may be transferred by endorsing the certificate and delivering the same, which delivery may be in blank or to some identified person. Other methods for such transfer of stock are also set out in the said statute.

Whether or not a stock certificate endorsed by its owner and delivered by him to a stockbroker transfers the title to said stock to the said stockbroker, or merely gives possession thereof to the broker to enable him to cause the transfer of the title to the said purchaser, may largely be a question of fact to be determined from the applicable facts. The broker, being the client's agent, may well be the agent for delivering the stock certificate from the seller to the purchaser. If the transfer of the title to such stock is completed in Florida it would seem to be taxable in Florida, otherwise it may not be taxable in Florida.

Questions 1 and 2 are answered in the affirmative; the answer to question 3 depends upon whether the transfer of the title to the corporate stock is completed within or without the state. Whether or not the endorsement and delivery of a certificate of stock in blank, to a stockbroker, is a taxable transaction depends largely upon the purpose and intentions of the said transaction.

062-77—June 4, 1962

COURTS

COMPENSATION OF OFFICIAL COURT REPORTERS FROM
STATE FUNDS—§§29.04, 29.03, 29.01, 216.171(5), 1959,
REPEALED BY CH. 61-401, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTIONS:

1. What is the amount of compensation payable to the several official circuit court reporters under and pursuant to §29.04, F. S., in the light of the 1960 federal census?

2. Where the amount contemplated by the 1961 general appropriations act differs from that fixed by said §29.04, which controls such payments?

Said §29.04, F. S., in so far as here material, provides that "each official circuit court reporter shall receive an annual salary of \$3,000, payable in 12 equal monthly installments by the state treasurer, upon requisition of such court reporter; provided, however, that in counties having a population of more than 200,000 inhabitants according to the latest official census the compensation of such court reporters shall be \$1,800 per annum payable in

equal monthly installments. . . ." Prior to the adoption of Ch. 28275, 1953, this section of the statutes provided that "each official court reporter shall receive an annual salary of \$1,800, payable in 12 equal monthly installments, by the state treasurer, upon requisition of such court reporter. . . ." The reference to counties having a population of more than 200,000 was added by the 1953 amendment. We are here concerned with the proper construction of the phrase "in counties having a population of more than 200,000. . . ." Does this phrase relate and refer to *judicial circuits* instead of counties, so that it should be read as "in circuits having a population of more than 200,000. . . ."?

The title to said Ch. 28275, 1953, relates to the amendment of §§29.03 and 29.04, F. S., "relating to the compensation for services and salaries, expenses and duties of official circuit court reporters, and excepting certain counties from this act." (Emphasis supplied.) The exception in the said title is to counties *not* judicial district or districts. Section 3, Ch. 28275 provided that the said act "shall not apply to the court reporter in Volusia county, Florida." Under this section arose the question of the application of the increased salary to the official court reporter then a resident of Volusia county. The court, in *State v. Gay*, Fla., 72 So. 2d 274, text 275, upon the question of the application of said §3, Ch. 28275, stated that "it matters not whether the petitioner resides in Volusia county or any other county of the circuit, *she is not the court reporter in Volusia county*, but is the official circuit court reporter of the 7th judicial circuit. . . ." (emphasis supplied). This case in effect held that the circuit court reporter of a circuit was not the reporter of the county wherein she or he resides but of the circuit, whether composed of one or of several counties. When said Ch. 28275 was enacted in 1953 only three counties of the state had populations in excess of 200,000—Dade, 495,084; Duval, 304,029, and Hillsborough, 249,894. At the same time Dade and Hillsborough counties comprised single judicial circuits, the 11th and 13th. Duval county, together with Clay and Nassau counties, comprised the 4th judicial circuit. The status of these counties and the said judicial circuits has not changed. Although the official court reporter of the 4th judicial circuit resided in Duval county, in 1953, and still resides therein, he or she is nevertheless the official circuit court reporter for the 4th judicial circuit, not for Duval county. So far as we are advised no official circuit court reporter with jurisdiction limited to Duval county, has been provided by law. Section 29.01, F. S., provided in part that "there shall be, whenever the presiding judge or judges shall deem it necessary in any judicial circuit in this state, an official court reporter" to be selected and appointed as provided in said section.

Dade and Hillsborough counties continue to constitute one-county judicial circuits, to wit, the 11th and 13th judicial circuits. The only other county constituting a single judicial circuit of this state is Monroe county, comprising the 16th judicial circuit, however, with a population of less than 200,000. Duval, Pinellas, Broward, Orange and Palm Beach counties, in addition to Dade and Hillsborough counties, have populations in excess of 200,000; however, neither of them constitute a single county judicial circuit. In the light of the above and foregoing, we do not feel that the proviso in §29.04, F. S., relating to *counties* having a population of more than 200,000, may be read as referring to *judicial circuits* having the stated population instead of counties having such a

population. When we read the title of the act from which present §29.04, F. S., was derived, with the body of the said act, and present §29.04, we are unable to say that the legislature intended to refer to judicial circuits instead of counties. The fact that Dade and Hillsborough counties, with populations in 1953 when said Ch. 28275, was adopted, of more than 200,000, constituted single county judicial circuits suggests a reason for reference to counties instead of judicial circuits. The only other single county judicial circuit was the 16th embracing Monroe county with a population of 29,957. Dade, Hillsborough and Monroe counties are the only single county judicial circuits of the state at the present time, with Monroe's population of 47,921. We, therefore, construe the said reference to counties as referring to counties constituting one-county judicial circuits, not to judicial circuits generally.

We, therefore, hold that unless otherwise limited by local or special law, or law of limited application, the salaries of each of the several official circuit court reporters of the state, except those of the 11th and 13th judicial circuits, should be \$3,000 per annum; those of the 11th and 13th judicial circuits are fixed by the said statute at \$1,800 per annum.

We deem it advisable to examine the rule announced in *State ex rel Williams v. Lee*, 140 Fla. 380, 191 So. 697, and *State ex rel Knott v. Lee*, 144 Fla. 164, 197 So. 681, wherein the amount fixed in the legislative budget of the biennial appropriations act was held to control over the applicable salary statute. An examination of these cases reveals a statutory provision making the amount fixed in the general appropriations act the salary during the biennial period in lieu of the statutory salary under stated circumstances. Section 11, Ch. 19280, 1939, the applicable statute in the *Williams* case, provided that "where the salary of any officer or employee of the state has not been changed by any act of the legislature of 1939, the appropriation for salaries respecting such officer or employee shall control the salary or compensation to be paid such officer or employee." Like provisions were contained in the appropriations acts of 1941, 1943, 1945, 1947 and 1949, and a like provision was made permanent by §7, Ch. 26859, 1951, which became §216.171(5), F. S., providing that "where a sum is mentioned in the general appropriations act for the salary of a state officer or employee such amount shall control over prior statutes fixing such salary, except those enacted at the same session of the legislature as the appropriations act." This subsection made the rule in the *Williams* and *Knott* cases apply to all applicable cases, and if still the law would substitute the appropriated amount for the general salary amount, as the compensation of the several official circuit court reporters. However, we find that said §216.171, F. S., including said subsection (5) thereof, was expressly repealed by §2, Ch. 61-401, thereby removing the statutory provision which formed the basis for the holdings in the *Williams* and *Knott* cases.

In *State ex rel Williams v. Lee*, supra, the court states that where "a state officer's salary is fixed by statute, he is entitled to payment therefor on his requisition to the extent of the salary fixed by law irrespective of the amount specified therefor in the general appropriations act of the legislature." To the same effect see *Advisory Opinions* in 114 Fla. 520, 154 So. 154, and in 74 Fla. 250, 77 So. 102, text 103. In *State v. Bloxham*, 26 Fla. 407, 7 So. 873, an appropriations act made provision for the payment of \$2,000 per annum to an officer whose salary was fixed by the con-

stitution at \$1,500. The court held that only a salary of \$1,500 could be paid notwithstanding the larger appropriation. In *Hailey v. Hutson*, 25 Idaho 165, 136 P. 212, text 213, and *White v. Houston*, 25 Idaho 214, 136 P. 214, under a state constitution similar to Florida's, it was held that where, in a general appropriations act, a larger appropriation was made for the payment of the salary of an officer than the salary provided by statute, that the salary act and not the appropriations act governed. In this case the appropriation was in excess of the salary act, the salary act was held to control. In this connection see also *Sellers v. Frohmler*, 42 Ariz. 239, 24 P. 2d 666, text 669. Mr. Justice Mathews, in *State v. Gay*, Fla., 74 So. 2d 114, text 135, et seq., in his dissenting opinion cited with approval *Hailey v. Houston*, supra. From the above and foregoing we doubt that the court in the *Williams* and *Knott* cases would have reached the same conclusion had the statutes involved not contained the provision for the payment of the appropriated amounts instead of the statutory salaries provided.

We are advised that the court reporter for the 4th judicial circuit was paid at the rate of \$1,800 for the last biennium, in accordance with the appropriation made by the 1959 legislature, although §29.04, F. S., as above construed, fixed the salary for the court reporter for the said 4th judicial circuit at \$3,000 for said biennium. By reason of the above mentioned §216.171(5), F. S., the salary for the two-year period was fixed at the sum provided in the biennial appropriations act of 1959, which we understand was \$1,800 for said biennium. The application of said §216.171(5), prior to its repeal in 1961, is discussed above.

From the above and foregoing, we conclude that after the effective date of Ch. 61-401, the salaries of the several official court reporters are governed by §29.04, F. S., as above discussed, and not the amounts contemplated by legislative committees studying the 1961 appropriations. In case of any difference the provisions of §29.04 will control.

062-78—June 4, 1962

**PUBLIC PURCHASING
COMPETITIVE BIDDING REQUIREMENTS—INAPPLICABILITY
TO POLITICAL SUBDIVISIONS PURSUANT TO
§§287.051(3), 125.08, 125.081, F. S.**

To: *Ralph R. Siller, Executive Director, State Purchasing Commission, Tallahassee*

QUESTION:

May any county, county board of public instruction, municipal or other local public agency or authority avail itself of the provisions of §287.051(3), F. S., without first complying with the requirements of competitive bidding statutes applying to the above-mentioned political entities?

Prior to its amendment in 1961, §287.051(3), F. S., provided as follows:

(3) The arrangement of provisions in purchase contracts of the state or any agency, providing that the same price for which a commodity is available to the state, shall also, during the period of time provided therein be available to any county, county board of pub-

lic instruction, municipal or other local public agency or authority which may desire to purchase at the state contract price.

Thereafter, in 1961, the Florida legislature amended §287.051 (3), *supra*, to read as follows:

(3) The arrangement of provisions in purchase contracts of the state or any agency, providing that the same price for which a commodity is available to the state, shall also, during the period of time provided therein be available to any county, county board of public instruction, municipal or other local public agency or authority which may desire to purchase at the state contract price. Purchases by any county, county board of public instruction, municipal or other local public agency or authority under the provisions in state purchase contracts, at the state contract price, shall be exempt from the competitive bid requirements otherwise applying to purchases by such political subdivisions and authorities.

An examination of this authority reflects the obvious intent of the Florida legislature to exempt the named political subdivisions from complying with specific competitive bidding statutes when the said subdivisions elect to avail themselves of any executed state contract concerning the same subject matter.

In reaching the above conclusion, I have not overlooked the provisions of §125.08, F. S., or the effect of the language in the case of *Armco Drainage and Metal Prod., Inc. v. County of Pinellas, Fla.*, 137 So. 2d 234.

However, in view of the fact that §287.051 (3), *supra*, as quoted above was enacted subsequent to §125.081, *supra*, and the action assailed in the *Armco* case occurred prior to the adoption of §287.051 (3), *supra*, it is my opinion that the decision in the *Armco* case has no application to §287.051 (3), *supra*; and the provisions of this latter authority would control over the requirements of §125.081, *supra*.

Your question is accordingly answered in the affirmative.

062-79—June 11, 1962

COUNTY PUBLIC HEALTH UNITS
USE OF COUNTY HEALTH UNIT FUNDS FOR COUNTY UNIT
BUILDING—TRANSFER TO BOARD OF COUNTY COM-
MISSIONERS FOR SUBJECT PURPOSE—§§154.02,
154.03, 154.04, 216.02, 129.06(1), F. S.

To: Florida State Board of Health, Jacksonville

QUESTIONS:

1. May local health units funds on deposit in the state treasury be transferred from the local health unit trust fund of a county to the board of county commissioners to be used in the construction of an addition to the county health unit building?

2. May earned overhead allowances to a county health unit, or to the state board of health for the benefit of such county, be used for an addition to the county health unit building?

Under §154.03, F. S., cooperation between county public health units, organized under Ch. 154, F. S., is authorized, and county

funds raised for public health purposes are required to be paid over to the state treasurer to become "a part of the full-time *local health unit trust fund* of such county," to be "*expended by the state board of health solely for*" *public health purposes within the said county*. Public health funds from the federal government allocated to the said county may also be paid into the said local health unit trust fund. Said Ch. 154, F. S., is in effect an appropriation of the funds paid over to the state and deposited in the local health unit trust fund, under §154.03, for operation of the applicable local health unit. The statute earmarks the funds so paid over to the state treasurer for county health unit purposes. It appears from §154.04 that the primary duties of county public health units are "the control of preventable diseases and the education of the public in modern scientific methods of sanitation, hygiene and control of communicable diseases *in cooperation with and under the supervision of the state board of health.*"

County public health units have been created by the legislature in some counties by local or special acts; for example, such a local health unit was created by Ch. 24827, 1947, in Pinellas County. This health unit "shall be the governing body and shall be responsible for the operation of the Pinellas county health unit and shall be vested with all administrative powers and authority of the Pinellas county health unit." Section 5 of this act requires that "the county health officer, together with the health board shall prepare an itemized estimate budget for the ensuing fiscal year for the operation and cost of the program of the Pinellas county health unit and submit same to the board of county commissioners of such county at a reasonable time prior to the adoption of the county budget by the county commissioners and if the budget of the health board is found to be satisfactory, the county commissioners shall approve same" When this is done the same results in an official budget of expenditures of county health unit funds.

Under §216.02, F. S., each state department, bureau, division, officer, commission, institution, board or agency, supported and operated from state funds is required to furnish to the state budget commission a budget of its expenditures contemplated for the next biennium, which, when approved by the state budget commission, is transmitted to the legislature, and forms the basis for the biennial appropriation, which, when adopted by the legislature and not vetoed by the governor, becomes the operative budget for the next biennium.

Expenditures not made according to such county and state budgets are unauthorized and illegal. This being true, neither the state board of health nor the county health unit, nor they together, have any authority to allocate county health unit funds to a purpose not contemplated by the said appropriations. Such funds may not be used in the construction of an addition to the county health unit building, absent a duly made appropriation authorizing such a use.

In *Adams v. Lott*, 112 Fla. 489, 150 So. 596, text 597, the court treated the county budget as having "the force and effect of fixed appropriations," which "may be likened in this respect to legislative appropriations made by the legislature for general legislative expenses." See also §129.06(1), F. S. Before funds in the local health unit trust fund of a county, in the state treasury, may be withdrawn or paid therefrom, there must exist an appropriation for such withdrawal or payment; absent such an appropriation no

such withdrawal or payment may be made. As of the present there appears to be no such appropriation for the transfer contemplated by the above stated question. Unused portions of appropriations remaining at the end of the appropriation period lapse or revert to the fund from which appropriated. This is true as to both the state and the county appropriation. Such unused portion of an appropriation may be included in and made a part of the appropriation of the succeeding year, however, as a part of the appropriation for that succeeding year. Unused portions of both the state and county appropriations, unused at the end of an appropriation period, revert to the fund from which appropriated and may not be used in the next appropriation period absent a reappropriation thereof, as aforesaid.

Although provision is made in §129.06, F. S., for the amendment of county budgets regulating county expenditures, legislative appropriations are subject to amendment only by the legislature itself. Budgets made under said §§129.06 and 154.02, F. S., have the approval of both the board of county commissioners and personnel of the county public health unit, which govern its expenditure for the benefit of the said county public health unit. This county fund is supplemented by state funds appropriated by the Florida legislature. Such state appropriations doubtless take into consideration the funds available in the county health unit trust fund made available by the county. The two appropriations are interdependent. The state appropriation was made pursuant to work budgets submitted by the state board of health to the state budget commission, and by it submitted to the state legislature. The state board of health and the state budget commission appear to have some interest in both the county and the state appropriations, in that said appropriations have an interdependency.

Question 1 is answered in the affirmative; when it is made to appear that the board of county commissioners, the personnel of the county health unit, the state board of health, and the state budget commission have, in writing, duly approved by board action, found that funds are available for the purpose mentioned, without detriment to the remaining function of the local health unit, and the county budget is amended by the board of county commissioners so as to provide an appropriation therefor.

Question 2 relates to certain "earned overhead allowances" which have accumulated, evidently to the credit of the county health unit, in the state treasury. We are under the impression that these funds may have accumulated over the period of more than one appropriation period. If these funds inure to the use of the county health unit they should not be permitted to accrue beyond the next appropriations to such county health unit. Such funds inuring to the credit of the county health unit should be considered as available funds in the preparation of the next budget and appropriated as are other available county funds. If such funds are available to the applicable health unit, they may be appropriated for health unit building purposes in the same manner as is made applicable to question 1. We are not here deciding whether such funds inure to the credit of the health unit but are accepting the conclusion of the acting state health officer as to their availability for health unit use.

Should federal funds be available to assist in financing the proposed construction, and such funds be made available by the proper federal officer, board, commission, etc., such funds may

be used to the extent so authorized in the contemplated construction.

062-80—June 11, 1962

TAXATION

DOCUMENTARY STAMP TAXES—CONTRACTS TO SELL AND CONVEY—ASSIGNMENTS—§201.02 AND CH. 201, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

What is the measure of documentary stamp taxes required where the interests of the vendor in a contract to sell and convey real property are conveyed and/or assigned to a third party?

Contracts for the sale and purchase of real property are bilateral ones in which both the contracting parties are bound to fulfill reciprocal obligations toward each other, under which the seller holds the legal title to the property described, in trust for the purchaser upon his compliance with the contract requirements of him, and the purchaser holds the equitable title to the property, and becomes trustee for the payment of the purchase price. The seller holds the legal title in the nature of security for the payment of the purchase price by the purchaser. (12 Am. Jur. 506, §8; 17 C. J. S. 326 and 327, §8; *Hall v. Northern and Southern Co.*, 55 Fla. 235, 46 So. 178; *Opinion of Nov. 25, 1959*, as revised Feb. 25, 1960, 059-244, 1959-1960 AGO 381).

Under AGO of November 25, 1959, as revised Feb. 25, 1960 (059-244; 1959-1960 AGO 381) the equitable title of a vendee under a contract for the sale and purchase of real property, was held to be within the purview of §201.02, F. S., and subject to taxation; however, it was further held that when the fee title was conveyed credit should be allowed for the taxes paid upon the contract for deed when not paid in full upon the passing of the equitable title under the contract of sale.

Section 201.02, F. S., imposes the tax not only upon deeds of conveyance conveying the legal title, but also upon other instruments and writings whereby an interest in the land, other than the full title, is assigned, transferred or otherwise conveyed. The transfer of the legal title retained by the vendor upon the passing of the equitable title to the vendee would appear to be subject to taxation on the consideration paid therefor. Here a distinction is drawn between the legal title held by such a vendor and the part of the purchase price remaining unpaid, that is, the written obligation of the vendee, under the sales contract, to pay the remainder of the purchase price for the land purchased. This obligation may be said to be held by the vendor as an intangible, separate and apart from the legal title retained by him. The said legal title may be transferred separate and apart from the obligation of the purchaser to pay the remainder of the purchase price for the property, or the said obligation to pay money may be assigned and transferred by the vendor to another, subject to the obligation to convey to the vendee upon his compliance with the said contract. Normally, any transfer or assignment of the obligation would include a conveyance of the legal title retained by the vendor; however, sometimes the two are separately transferred to separate transferees.

The transfer of the obligation under the contract to sell and convey would not appear to be within any taxable provision of Ch. 201, F. S. However, the transfer or conveyance of the vendor's legal title would be within the purview of §201.02, F. S., and taxable at the rate of 20¢ "on each \$100 of the consideration." When the vendor sells and transfers his interest in the obligation of the vendee aforesaid, whether separately or with the legal title held by him, he will have received the consideration due him under the said contract to sell and convey. Such will also be the case when he sells and conveys the legal title retained by him, but retains the written obligation to pay money of the vendee. Unless the stamp taxes under said §201.02, F. S., be paid at the time of the making and delivery of the contract to sell and convey, such taxes should be held due and payable when the legal title is conveyed by the vendor whether to the vendee or to some third person charged with carrying out the obligation to convey under the said contract to sell and convey.

Should the taxes under §201.02, F. S., be measured merely and only by the consideration paid the vendor by a third person purchasing subject to the contract to sell and convey, and subsequently by the consideration passing to said third person on his conveyance to the vendee under the contract to sell and convey, which in each case would be merely nominal amounts, the state would stand to lose the major part of the taxes that should be paid on the completed transaction. This would especially be true when the obligation of the vendee is transferred to a third person by the vendor without a transfer of the vendor's legal title.

We are, therefore, of the opinion that when a vendor, under a contract to sell and convey real property, transfers such property to a third person, whether such transfer includes the obligation of the vendee to pay money or not, documentary stamp taxes for such transfer should be measured by the consideration agreed to be paid by the vendee, less any taxes previously paid on such transaction under said §201.02, F. S., if any.

062-81—June 11, 1962

PUBLIC OFFICER

CONFLICT OF INTEREST—LIMITATION UPON DEPOSIT OF
PUBLIC FUNDS BY OFFICER IN BANKING INSTITUTION
OF WHICH HE IS STOCKHOLDER—§§839.09, 18.10 ET
SEQ.; CH. 136, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where a minority stockholder of a banking or similar institution, becomes a public officer or member of a governmental board or agency, may such officer, or board of which he is a member deposit public funds under his or its control or jurisdiction with such banking or similar institution?

Under the common law public officers were not permitted to place themselves in a position where their personal interests came into conflict, either directly or indirectly with the duty they owe to the public as such officer (67 C. J. S. 406, §116). Generally, a public officer, including boards and agencies of which he

is a member, may not transact business with any firm, association or corporation of which he is a member, stockholder or director (see Annotation in 140 A. L. R. 344-361; AGO 061-132, of Aug. 24, 1961). This rule has been followed by the Florida courts (26 Fla. Jur. 255, 263 and 272, §§114, 126 and 137). This rule is also recognized by §839.09, F. S., making its violation, in specified cases, a criminal offense. "A public office is a public trust and the holder thereof may not use it, directly or indirectly, for a *personal profit*, and officers are not permitted to place themselves in a position in which their *personal interest* may come into conflict with the duty they owe to the public." (67 C. J. S. 406, §116; emphasis supplied.)

In *State v. Robinson*, 71 N. D. 463, 2 N. W. 2d 183, the court held that the interest contemplated, sufficient to disqualify such an officer, whether direct or indirect, must be an interest accruing to the officer personally. The rule seems to treat the officer as bearing a trust relation to the public, and is bottomed on the rule that "the law does not permit a trustee or an agent to make contracts with himself regarding the property committed to his charge." (*Lainhart v. Burr*, 49 Fla. 315, 38 So. 711). The purpose of the rule was stated in *State v. Hooten*, Fla. App., 122 So. 2d 336, text 140, as being designed to prevent a public officer from misusing the powers of his office and turning them to his own profit. In every transaction between a public officer and another which may, directly or indirectly, result in a personal profit to such officer, such officer is disqualified and may not enter into it, and this without regard to whether the particular transaction would or would not profit the officer. The rule looks to the possibilities for profit, not to actual profit.

Whenever the relation between a public officer and a firm or corporation of which he is a member, stockholder or director, is such that such officer may, either directly or indirectly, and to any extent, so control the transaction so as to influence the same to the benefit of himself or the firm, corporation, etc., of which he is a member, stockholder, director, or otherwise, then he and the said firm, corporation, etc., may transact no business one with the other.

Whenever the relationship between the public officer and such a firm, corporation, etc., is such as to accord that officer such a degree of control over the action of such firm, corporation, etc., as to permit him to exercise such a degree of control over the transaction, however small, as to influence the outcome of the same, then there is such a personal interest as will disqualify such officer or the board or agency of which he is a member from entering into any business transaction with such firm, corporation, etc. An officer or director of such a firm, corporation, etc., must be presumed to have such a degree of control as to influence the transaction and be without the prohibition.

Sections 18.10, et seq., F. S., make provision for the establishment and regulation of state depositories, and Ch. 136, F. S., makes provision for the establishment and regulation of county depositories, for the deposit of public funds by state and county officers, boards, commissions, bureaus, departments, institutions and agencies. Therefore, where public funds are deposited by a state or county officer, board, commission, bureau, department, institution or agency, in a bank or other financial institution *duly designated and approved* as a state or county *depository* by a state or county

officer, or member of a state or county board, bureau, department, institution or agency, who is a stockholder in such banking or other financial institution, the same should not be deemed and held to prevent or disqualify such deposits in the bank or institution of which he is a stockholder *unless* his stock holdings, or that of combinations, including corporations, are such that an effective control, either directly or indirectly, may be presumed to be possible by reason of such stock ownership. Furthermore, deposits should under usual circumstances be equitable among available banks and other financial institutions and not concentrated in a single institution. Such a concentration might well render the transaction unlawful. However, if it appears a minority stockholder, also a public officer, is taking advantage of his official position to give a preference of public deposits to his bank contrary to an equitable spread of deposits among other banks, this fact would tend to establish a misuse of public trust and a conflict of interest.

Although one stockholder having only a few shares of stock may exercise little, if any, control over the operation of the corporation and its business operations, should a group of such stockholders combine into a group sufficient in number to exercise a material control over the corporation and its business transactions, each of such stockholders should be deemed to have such a personal interest as would bring them and each of them into the rule above and prohibit, as public officers, their entering into transactions with their corporation. Only when a member or stockholder of a firm or corporation has such an interest or control in or over the term, corporation, etc., as may be presumed to give him some control, however, small, over its business is he disqualified to transact business with it. It is not the actual control, but the possible control, that disqualifies. Where the control is reasonably possible the disqualification will be presumed whether exercised or not. A similar rule should be applied to statutes providing for depositories for municipal corporations and other local agencies, with like or similar regulations.

We have in the above and foregoing spelled out the rules to be applied when determining when a public officer, who is a minority stockholder in a banking institution, may deposit public funds under his control in a banking institution in which he is a stockholder; we do not here apply the said rules to directors of a banking institution who are also public officers. We consider their position of control is clearly manifested by their dual managerial positions which renders their banks or similar institutions ineligible to receive deposits.

062-82—June 13, 1962

TAXATION

TAX ON SHARES OF STOCK ISSUED BY FEDERAL LAND BANK ASSOCIATIONS—§193.08, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are shares of stock issued by federal land bank associations, issued under §§731, et seq., title 12, U. S. code, subject to state ad valorem taxation?

Section 932, title 12, U. S. code, provides that

... nothing in §§931-933 of this title shall prevent the shares in any joint-stock land bank from being includ-

ed in the valuation of the personal property of the owner or holder of such shares, in assessing taxes imposed by authority of the state within which the bank is located; but such assessments and taxation shall be in manner and subject to the conditions and limitations contained in §548 of this title with reference to the shares of national banking associations.

Persons desiring to borrow funds from the federal land banks

. . . shall make application for membership and shall subscribe for shares in such farm loan association to the amount equal to 5% of the desired loan, said subscription to be paid in cash upon the granting of the loan. . . . Said capital stock shall be paid off at par and retired upon full payment of said loan. Said capital stock shall be held by said association as collateral security for the payment of said loan. . . . (§733, title 12, U. S. code).

Under §548, title 12, U. S. code,

. . . the shares of any national banking association *owned by nonresidents* of any state shall be taxed by the taxing district or by the state where the association is located and not elsewhere; and such association shall make return of such shares and pay the tax thereon *as agent of such nonresident shareholders*. (Emphasis supplied.)

This rule is made applicable to shares issued by federal land bank associations by §932, title 12, U. S. Code. As to *resident shareholders*, the federal land bank association would seem to have the right to elect to make returns for such stockholders under and in accordance with §193.08, F. S.

Subject to the above and foregoing the above stated question is answered in the affirmative.

062-83—June 13, 1962

MOTOR VEHICLES

PENALTY FOR DRIVING WHILE LICENSE IS UNDER
SUSPENSION—§§324.051, 324.201, 324.221, 322.03 AND
322.34, 322.39, F. S.

To: Johnie A. McLeod, Justice of Peace-Coroner, Apopka

QUESTION:

Where a driver's license has been suspended pursuant to Ch. 324, F. S., would driving while such license is still under suspension be punishable pursuant to §322.34, F. S., or some other applicable provision?

According to the provisions of §324.051, F. S., the driver's license of an uninsured operator is required to be suspended where such operator was involved in a motor vehicle accident in this state resulting in bodily injury to any person or property damage exceeding \$50. Said §324.051 sets forth certain conditions which, if complied with, would exempt such operator from the provisions of said section. For the purposes of this inquiry it is assumed, therefore, that the operator has not availed himself of such exemptions set forth in said section and that his license has been suspended accordingly.

Section 322.34, F. S., makes it a misdemeanor to drive while a license is suspended or revoked and provides as follows:

322.34 *Driving while license suspended or revoked.*—

Any person whose operator's or chauffeur's license, or driving privilege as a nonresident, has been cancelled, *suspended or revoked as provided in this chapter*, and who drives any motor vehicle upon the highways of this state while such license or privilege is cancelled, suspended, or revoked, is guilty of a misdemeanor and upon conviction of a first offense shall be punished by imprisonment for *not less than 10 days nor more than 30 days*, and there may be imposed in addition thereto a fine of not more than \$500. . . . (Emphasis supplied.)

Section 322.39, F. S., makes it a misdemeanor to violate *any* of the provisions of Ch. 322, F. S. Subsection (2) of said section provides as follows:

(2) *Unless another penalty is in this chapter or by the laws of this state provided*, every person convicted of a misdemeanor for the violation of any provision of this chapter shall be punished by a fine of not more than \$500, or by imprisonment for not more than six months, or by both such fine and imprisonment. (Emphasis supplied.)

Section 322.03, F. S., provides that no person shall drive any motor vehicle on a highway in this state unless such person has a valid license as an operator. Construing the foregoing provisions of Ch. 322, F. S., a person driving with a suspended license would not have a "valid license" within the contemplation of §322.03, F. S., and would seem to be subject to the general misdemeanor penalty set forth in §322.39. However, in view of the specific language appearing in §322.39(2), *supra*, the penalty for driving while one's license is suspended would be fixed by the provisions of §322.34, *supra*. The situation is further complicated by the fact that the penalty provided by §322.34 is specifically restricted to situations where the driver's license has been "suspended or revoked as provided in this chapter" meaning Ch. 322, F. S. It would logically follow, therefore, that an operator's driver's license, suspended pursuant to the provisions of Ch. 324, would not be subject to the misdemeanor penalties set forth in §322.34. Instead, however, such operator would be subject to the misdemeanor provisions of §324.221, which provides in part as follows:

Any person who shall violate §324.201 or any other provision of this chapter for which no penalty is otherwise provided, shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$500 or imprisoned for not more than 90 days, or both, in the discretion of the court. . . .

Section 324.201, F. S., states in part that: ". . . It shall be unlawful for any person whose license has been suspended to operate any motor vehicle"

In view of the language appearing in §§324.201 and 324.221, F. S., it would be my opinion that an operator whose driver's license has been suspended, pursuant to the provisions of §324.051, would be subject to the penalties set forth in §324.221 and not to those contained in §322.34, F. S. The legislature, in fixing separate and distinct penalties for the violation of Chs. 322 and 324, F. S., apparently recognized the distinction between a suspension for a driving offense, committed under the provisions of Ch. 322 and the suspension for failing to be properly insured as provided in Ch. 324.

It should be noted that AGO 049-302 (p. 368, 1949-50, biennial report of the attorney general) to which you refer would not seem to be applicable in the instant situation since at the time said opinion was prepared, §§324.201 and 324.221 were not in existence.

Your question is, therefore, answered accordingly.

062-84—June 14, 1962

TAXATION

CORRECTION OF ERRORS OF OVERVALUATION BY TAXING OFFICIAL—§§192.21 AND 193.40, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Where a county assessor of taxes in this state inadvertently makes an overvaluation of a lot or parcel of taxable real property by including nonexistent improvements, such as including the value of a nonexistent building, may such a valuation be corrected after equalization by the board of county commissioners?

The particular error giving rise to the above stated question arose when the county assessor of taxes, through inadvertence and error, included two buildings, located on other lands, in fixing the valuation of a parcel of land for purposes of taxation, by reason of which the parcel of land being assessed was given a valuation greatly in excess of its actual taxable value. Evidently, the taxpayer was given no actual notice of this overvaluation by the assessor of taxes or by any other person. It is also evident that this inadvertence and error of the assessor of taxes was not discovered by any of the taxing officials until after the delinquent tax sale, at which the taxes so assessed were purchased by an individual and not by the county. Prior to the enactment of Ch. 10040, 1925, this assessment would doubtless have been held void by the courts. Said Ch. 10040 provided in part that "no act of omission or commission on the part of any tax assessor, or any assistant tax assessor, or any tax collector, or any board of county commissioners . . . shall operate to defeat the payment of said taxes; but any such acts of omission or commission may be corrected at any time by the officer responsible for the same in like manner as is now or may hereafter be provided by law for performing such act in the first place and when so corrected shall be construed as valid ab initio and shall in no way affect the process provided by law for the enforcement of the collection of said tax." This language was retained by Chs. 14572, 17442, 20722 and 22079, 1929, 1935, 1941 and 1943, amending the said 1925 enactment and extending the same.

Doubtless the intent and purpose of this legislation, now appearing as §192.21, F. S., was to permit the correction of errors in tax assessments held by the courts, prior to the adoption of Ch. 10040, 1925, to be void ab initio, and relieving the taxpayer from the payment of the taxes so assessed or any part thereof, thereby escaping taxation for the tax year. Under the statutes, "acts of omission and commission (by the taxing officials) may be corrected at any time." We are here confronted with the question of whether a correction, under and pursuant to said §192.21, may be made over the objection of the purchaser of the tax sale certificate issued pursuant to said erroneous tax assessment. In

the case giving rise to the above question the tax assessment was based on a valuation by the assessor of taxes as including two nonexistent buildings greatly increasing the valuation of the property for purposes of taxation, to an amount greatly in excess of its full cash value. This appears to have been an error of omission or commission, and not an error of judgment, on the part of the county assessor of taxes.

The authority of the taxing officials to correct errors of omission and commission was clearly one of the purposes of said Ch. 10040, 1925, and §192.21, F. S. The validity of this section of the statutes has been recognized by the courts of this state. In *State v. Lummus*, 111 Fla. 746, 149 So. 650, the holder of a tax sale certificate issued in 1928 for 1927 taxes, several years after issuance thereof, brought mandamus against the tax assessor, the tax collector, the clerk of the circuit court, and others, to require them to correct nunc pro tunc errors of omission and commission made during the tax assessment proceedings. A peremptory writ of mandamus was issued requiring the correction of the errors of omission and commission made by the taxing officials. The court said that "the duty to have legal proceedings constitutes a continuing duty resting on taxing officials." These corrections were directed by the court after the purchase of the tax sale certificate by an individual. In *Fort Myers v. Heitman*, 149 Fla. 204, 5 So. 2d 410, text 412, the court said that, what is now §192.21, F. S., established the rule "that no act of omission or commission in making assessments for ad valorem taxation shall operate to defeat the payment of duly authorized taxes, but such acts of omission or commission may be corrected at any time, and when so corrected shall be valid ab initio and the assessment enforced."

We are, therefore, of the opinion that §192.21, F. S., was intended to vest in the county taxing officials ample authority to correct errors of omission and commission made in the process of assessing taxable property for ad valorem taxes, even though the tax sale certificates may have been issued or assigned to some person, firm or corporation. Such purchasers and holders of tax sale certificates, purchasing such certificates since 1925 took them fully charged with the provisions of §192.21, F. S., and the duty and authority of the taxing officials to correct errors of omission and commission "at any time." We do not think that the phrase, also contained in said §192.21, that "no assessment shall be held invalid unless suit be instituted within sixty days from the time the assessment shall become final," in any way prevents the correction of errors of omission or commission by a taxing official such as the one above described, if not discovered until after the delinquent tax sale, and until the tax sale certificate has passed into the hands of a purchaser thereof. Such transfer and ownership will not prevent the correction of such error of omission or commission, even to the reduction of the face amount of the said tax sale certificate. However, before such a correction, reducing the principal amount of the certificate, may be made, the purchaser thereof should be notified and permitted to be heard. Where there has been a gross overvaluation, such as the inclusion of building values as a part of the property valuation, when no such buildings exist on the lands, the taxing officials have ample authority to correct the said valuation and the assessment made pursuant thereto, reducing the amount of

the taxes assessed and correcting all taxable records and the tax sale certificate accordingly. Should the holder of the tax sale certificate refuse to surrender his tax sale certificate for correction, all tax records concerning the same should be corrected and the tax certificate holder duly notified, by registered or certified mail, or personal service, of the correction. After such correction all county officials should honor such correction.

When the amount of a tax assessment, which in turn will change the principal amount of the tax sale certificate when corrected after tax sale, is made after the said tax sale, when such tax sale certificate is in the hands of a purchaser, such change in amount will affect a change in the principal of the tax sale certificate. Such tax sale certificate should be called in and the corrections made, after which it should be returned to the holder. Where a holder of such a tax sale certificate refuses to return his certificate for correction and refuses to recognize the change in amount, the taxing officials should nevertheless make the required changes on the tax record showing the correction, after which the public officers should refuse to recognize the original amount of such certificate, recognizing only the corrected principal of the said tax sale certificate.

Where such a correction of a tax assessment, sale and tax certificate reduced the principal of the said tax certificate the owner and holder thereof will be entitled to a refund of the reduced amount, the same to be made in accordance with §193.40, F. S. There will have been an overpayment of the tax when the certificate is reduced in amount, within the purview of said §193.40, F. S. "It is a general rule that, in the absence of statute or express contract, the county is not liable for interest on its obligations." (*Duval County v. Charleston Eng. and Contr. Co.*, 101 Fla. 341, 134 So. 509, text 518; see also *Nat'l Bank v. Duval County*, 45 Fla. 496, 34 So. 894, text 895; 14 Am. Jur. 215, §47.)

The above authorities and observations answer the above stated question in the affirmative; the procedure to be followed is substantially set out above.

062-85—June 18, 1962

CORPORATIONS

MERGER OF DOMESTIC CORPORATION WITH PUERTO RICAN CORPORATION—UNAUTHORIZED—

§608.21, F. S.

To: Tom Adams, Secretary of State, Tallahassee

QUESTION:

Does §608.21, F. S., authorize a corporation organized under the laws of Puerto Rico to consolidate or merge with a corporation organized under the laws of Florida?

Section 608.21, F. S., provides in part:

Any one or more corporations existing under the laws of this state, may consolidate or merge with one or more other corporations organized under the laws of *any other state* or of the United States, if the laws under which said other corporation or corporations are formed shall permit such consolidation or merger. . . . (Emphasis supplied.)

Nowhere in the definition section relating to business cor-

porations is the word state defined to include commonwealths which have not attained statehood such as Puerto Rico. While the distinction may be slight, a corporation formed under the laws of Puerto Rico would not be a corporation of a state as contemplated in §608.21, F. S.

The authorities indicate that corporations formed under the laws of a territory become corporations of the state upon the admission of a territory into the union as a state (20 C. J. S. 11, Corp., §1786, and 23 Am. Jur. 23, Foreign Corp., §11). By analogy a Puerto Rican corporation is not a corporation of a state and thus there is serious doubt that the merger of a domestic corporation with a Puerto Rican corporation would be authorized under the provisions of §608.21, F. S.

It might be pointed out in passing that "a corporation by or under an act of a territorial legislature is not a federal corporation but a corporation of the territory, and it has the status of a foreign corporation in every other state and territory . . ." (20 C. J. S. 11, Corp., §1786, 23 Am. Jur. 23, Foreign Corp., §11). Thus, it would appear that there would be no organic prohibition against a Puerto Rican corporation merging with a Florida corporation should the legislature desire to amend §608.21, F. S., accordingly.

Your question as set out above is, therefore, answered in the negative.

062-86—June 27, 1962

PUBLIC OFFICERS

RESIGNATION—WHEN EFFECTIVE—§114.01(2), F. S.

To: *Anthony S. Battaglia, Member Florida Republican National Committee, Madeira Beach*

QUESTION:

If a public officeholder submits his resignation to the governor from the office which he is presently holding, is that office considered vacated at the time the resignation is officially received by the governor or is it necessary for the governor first to accept the resignation before the office is considered vacated?

Section 114.01(2), F. S., provides as follows:

Office deemed vacant in certain cases.—Every office shall be deemed vacant in the following cases:

* * *

(2) By his resignation.

The statutes are silent as to whether or not such resignation must be accepted by the governor in order for the office to be deemed vacant. In 26 Fla. Jur., Public Offices, §79, it is indicated that there are two views on whether an acceptance is necessary to render a resignation effective.

. . . According to some authorities, no acceptance is necessary especially when the resignation is unconditional and purports to take effect immediately. The other and more generally prevailing view followed in this state is that to be effective the resignation must be accepted by competent authority, either in terms of, or by something tantamount to, an acceptance, such as the appointment of

a successor. Without acceptance, a resignation is nothing and the officer remains in office. (Emphasis supplied.)

Cited in support of the foregoing proposition are the following cases: *State v. Crawford*, 76 Fla. 388, 79 So. 875; *In Re Advisory Opinion to the Governor*, 117 Fla. 773, 158 So. 441; *State v. Lunsford*, 141 Fla. 12, 192 So. 485.

In light of the above statements, it is my opinion that the prevailing view to be followed in this state is that a resignation is considered effective upon its *acceptance* by the governor, at which time the office becomes vacant.

062-87—June 28, 1962

SHERIFFS
FEEES AUTHORIZED IN CONNECTION WITH
CONDEMNATION PROCEEDINGS—
§73.01, F. S.

To: *John R. Phillips, Chairman, Florida State Road Department, Tallahassee*

QUESTION:

Are sheriffs entitled to charge a statutory fee for verifying, as true copies, such pleadings as they may be required to serve by the condemning authority in eminent domain proceedings?

In AGO 042-248, 1941-1942 biennial report of the attorney general, p. 32, it is recognized that a sheriff is entitled to charge the fee allowed by statute, viz:

<i>Copies of process</i> , 100 words or less	\$0.25
Every subsequent 100 words	\$0.10

for verifying *copies of process*.

In the Florida sheriff's manual, p. 139, it is noted that "in making *service*, the sheriff should be careful the copies served by him are actually true and correct copies." However, said opinion and manual refer to those papers coming within the classification of "court process" such as summonses, subpoenas, notices to appear, rules to show cause, etc., as distinguished from pleadings which may be attached to the court process such as complaints, affidavits, petitions or other pleadings. For it is generally held that process is not a part of the pleading of a plaintiff. Various papers have been held not to be embraced within the meaning of the term "process," such as a petition, complaint, information, indictment and a copy of an indictment (72 C. J. S., Process, §1(2)(b)).

Pursuant to rule 1.3(g), Florida rules of civil procedure, service of the summons and delivery of a copy of the complaint, affidavit, petition or other initial pleading is required. I believe the sheriff has a right to rely on the accuracy of the party who hands him the complaint or other pleading for delivery, as to the veracity of the copy to be left with the defendant. Particularly is this true in connection with condemnation proceedings where by statute the copy of the complaint delivered to the opposing party or parties must be verified by the condemnor (§73.01, F. S.).

It is fundamental that the legislature may require public officials to perform duties without providing compensation for the performance of those duties (*Rawls v. State*), 122 So. 272; 98 Fla. 103, *State ex rel May v. Fussell*, 24 So. 2d 804; 157 Fla. 55, *Gavagan v. Marshall*, 33 So. 2d 862).

It is my opinion that there is no statutory fee for a sheriff's

verification of copies of pleadings he may be required by law to deliver in connection with a condemnation or eminent domain action, *nor is there any requirement for the sheriff to verify such copies of pleadings.* Insofar as this opinion conflicts with AGO 042-248, *supra*, this opinion shall control; provided, however, that this opinion shall control; provided, however, that this opinion shall in no way be construed as affecting the payment of fees heretofore paid to the various sheriffs pursuant to said AGO 042-248, nor shall it affect the payment of such fees for service performed prior to the date of this opinion where such services were rendered and charged for under the authority of the 1942 opinion referred to above.

062-88—June 28, 1962

CRIMES
WORTHLESS CHECKS—CONSTRUCTION OF
§832.05(2), (3), F. S.

To: Tom Waddell, Jr., Judge, Court of Record, Brevard County, Melbourne

QUESTIONS:

1. Where X knowingly gives Y a worthless check in the sum of \$100 for a pre-existing debt and Y deposits said check in his bank, has X committed a felony or a misdemeanor under §832.05(2)(b), F. S.?

2. Where X purchases and receives from Y property of the value of \$10 and at the time of such purchase and receipt knowingly gives Y a worthless check for \$110 to pay for the property so purchased and to pay X's pre-existing debt of \$100 to Y, and where Y deposits said check in his bank, has X committed a felony or a misdemeanor under §832.05(2)(b), F. S.?

3. Where the facts are as stated in question 2, *supra*, except that, instead of depositing X's \$110 check, Y, who owes Z \$100, passes the check to Z to pay said debt and obtains \$10 in money from Z, has X committed a felony or misdemeanor under §832.05(2)(b), F. S.?

AS TO QUESTION 1:

Section 832.05(2)(a), F. S., reads as follows:

(a) It shall be unlawful for any person, firm or corporation to draw, make, utter, issue or deliver to another any check, draft, or other written order on any bank or depository for the payment of money or its equivalent, *knowing* at the time of the drawing, making, uttering, *issuing* or delivering such check or draft that the maker or drawer thereof has not sufficient funds on deposit in or credit with such bank or depository with which to pay the same on presentation; provided, that this section shall not apply to any check where the payee or holder knows or has been expressly notified prior to the drawing or uttering of same or has reason to believe that the drawer did not have on deposit or to his credit with the drawee sufficient funds to insure payment as aforesaid, nor shall this section apply to any post dated check. (Emphasis supplied.)

Section 832.05(2) (b), F. S., which provides the penalties for violating the above-quoted subsection, reads as follows:

(b) Violation of the provisions of this subsection shall constitute a misdemeanor and shall be punishable by imprisonment in the county jail not exceeding six months or by fine not exceeding \$300, unless the check, draft or other written order drawn, made, uttered, issued or delivered be in the amount of \$50, or its equivalent, or more and the payee or a subsequent holder thereof receives something of value therefor. In that event the violation shall constitute a felony and shall be punishable by imprisonment in the state penitentiary not exceeding five years, or in the county jail not exceeding 12 months, or by fine not exceeding \$1000. (Emphasis supplied.)

In my opinion, said §832.05(2) (b) means that:

1. If X knowingly gives Y a worthless check in the amount of \$50 or more, for the sole purpose of paying a pre-existing debt, and if Y or any subsequent holder of the check receives "something of value," regardless of amount, from another person in exchange for the check, then X is guilty of a felony under said §832.05(2) (b).

2. If X knowingly gives Y a worthless check for less than \$50, for the sole purpose of paying a pre-existing debt, then X is guilty of a misdemeanor under said §832.05(2) (b), regardless of whether or not Y or a subsequent holder receives something of value from another person in exchange for the check.

Under question 1 the *decisive point is whether* Y's deposit of the check in his bank results in his or a subsequent holder's receiving "something of value" for the check. When Y merely deposits the check, it is my opinion that he receives nothing of value; all that he receives is a credit which is subject to being cancelled if the check proves to be worthless.

However, in *Jones v. State* (Texas), 226 S.W.2d 437, the court of criminal appeals of Texas held that when a person deposited with one bank a check drawn by him on another bank, and received a deposit slip evidencing a credit for the amount of the check, and *with such credit purchased negotiable exchange in the amount of the check*, then that person received a thing of value for the check. By the same token, if Y deposits X's \$100 check in his bank and receives a deposit slip evidencing a credit for that amount, and uses that credit, or a portion thereof, to purchase a cashier's check, or if, instead of depositing the check, Y endorses it to the bank in exchange for a cashier's check, then, in my opinion, Y has received something of value for X's check and X is guilty of a felony under §832.05(2) (b). By the same token, also, if, after Y deposits the \$100 check in his bank, the bank pays a check drawn on it by Y (either before or after such deposit) and in doing so pays out all or part of the \$100 thus credited to Y's account by reason of his deposit of X's check, then it is my opinion that Y has obtained something of value for X's \$100 check and that X is guilty of a felony under §832.05(2) (b). However, it would appear that in order to establish that when the bank paid Y's check it paid out all or part of the \$100 thus credited to Y's account, it must be shown that, after the deposit of X's check, the bank has paid a check drawn by Y and that such payment has reduced Y's bank balance to an amount less than \$100.

AS TO QUESTION 2:

The only difference between this question and question 1, *supra*,

is that X purchases and receives property of the value of \$10 from Y and gives Y a check which includes not only the amount of his pre-existing debt to Y but also the \$10 purchase price of the property so purchased.

Insofar as §832.05(2)(b) is concerned, the foregoing remarks, in answer to question 1, about the effect of Y's action in depositing X's check are applicable here.

However, §§832.05(3)(a) and 832.05(3)(b), F. S., provide as follows:

(a) It shall be unlawful for any person, firm or corporation to obtain *any* services, *goods*, wares or other things of value by means of a check, draft or other written order upon any bank, person, firm or corporation, knowing at the time of the making, drawing, uttering, issuing or delivering of said check or draft that the maker thereof has not sufficient funds on deposit in or credit with such bank or depository with which to pay the same upon presentation, provided however that no crime may be charged in respect to the giving of any such check or draft or other written order where the payee knows or has been expressly notified or has reason to believe that the drawer did not have on deposit or to his credit with the drawee sufficient funds to insure payment thereof.

(b) Violation of the provisions of this subsection shall, if the check, draft or other written order be for an amount less than \$50 or its equivalent, constitute a misdemeanor and shall be punishable by imprisonment in the county jail not exceeding six months or by fine not exceeding \$300. Violation of the provisions of this subsection shall, if the check, draft or other written order be in the amount of \$50, or its equivalent, or more, constitute a felony and be punishable by imprisonment in the state penitentiary not exceeding five years, or in the county jail not exceeding twelve months, or by fine not exceeding \$1,000.

When X obtains from Y property of the value of \$10 for the check, he obtains goods, wares, or other thing of value by means of the check and, since the check is for more than \$50, X is guilty of a felony under §832.05(3)(b).

AS TO QUESTION 3:

Under the facts upon which this question is based, it is my opinion that:

1. X is guilty of a felony under §832.05(2)(b) because Y obtains something of value, viz., \$10 in money, for X's check for more than \$50.

2. X is guilty of a felony under §832.05(3)(b) because he obtains goods, wares or other thing of value, viz., property worth \$10, from Y by means of X's worthless check for more than \$50.

062-89—June 29, 1962

BEVERAGE LAW ADMINISTRATION

DISCOUNTS—POWER OF BEVERAGE DIRECTOR IN FIXING AMOUNT—§§561.01(13), 561.42(1),(6),(8), F. S.

To: Thomas E. Lee, Jr., Director, State Beverage Department, Tallahassee

QUESTIONS:

1. Is the director of the state beverage department

authorized or required to fix allowable discounts from distributors to vendors under the provisions of §§561.01 and 561.42, F. S.?

2. Are licensed distributors prohibited from giving discounts to a vendor when such discounts are not given equally to all other vendors under the provisions of §561.42, F. S.?

3. Would a discount to a vendor based on volume alone be a violation of §561.42, F. S.?

4. What is the meaning of "trade discount in the usual course of business" as used in §561.42, F. S.?

5. What is the duty of the director of the state beverage department in regard to fixing allowable discounts under the provisions of the Florida Statutes?

At the outset it should be noted that the question of discounts in the usual course of business is dealt with specifically only in Florida's so-called tied house evil law, §561.42, F. S. In subsection (1) thereof, licensed manufacturers and distributors are forbidden to have any financial interest "...directly or indirectly, in the establishment or business of any vendor licensed under the beverage law, nor shall such licensed manufacturer or distributor assist any vendor by any gifts or loans of money or property of any description or by the giving of any rebates of any kind whatsoever. ..."

Subsection (6) of the aforementioned statute, which provides that "Nothing herein shall be taken to forbid the giving of trade discounts in the usual course of business upon wine and liquor sales," makes it clear that the legislature has differentiated between the "rebates" prescribed by said subsection (1) and "trade discounts" covered in subsection (6). There is no specific provision made in said §561.42 authorizing the director of the state beverage department to fix allowable discounts. However, subsection (8) thereof provides that the director "may" establish rules and require reports to enforce the herein established limitation upon credits and other forms of assistance." (Emphasis supplied.)

Resort to other portions of Ch. 561, F. S., is necessary in answering the specific inquiry posed by you. Section 561.01(13) provides that:

(13) The term "discount in the usual course of business" shall mean a cash discount given simultaneously at the time of sale, which shall not exceed the allowable discount fixed by the director. Any discount which exceeds the allowable discount which the director by rule shall fix, shall be considered as an arrangement for financial assistance by gift.

Although the above quoted subsection appears in the definitions portion of Ch. 561, it seems clear that the legislature in passing such statute intended that in certain instances the director might regulate allowable "discounts in the usual course of business." Support is given to this proposition by a reading of the title to Ch. 28149, 1953, which amended §561.01(13), F. S., by adding thereto the language which apparently gives rise to your inquiry. The title of said act states in pertinent part as follows:

...and by amending subsection (13), of §561.01, so as to give the director power to set by order the maximum rate of discount to be allowed in the usual course of business

and declaring that any discount in excess thereof shall be considered an arrangement for financial assistance by gift...

Accordingly, in answer to question 1, it is my view that the director may fix allowable discounts if, in his discretion, the fixing thereof is necessary to enforce the tied house evil law and prevent the giving of any assistance to a licensed vendor in the form of rebates or otherwise which would tend to enable such manufacturer or distributor to establish a financial interest, directly or indirectly, in the business of a licensed vendor as proscribed by §561.42, F. S.

Questions 2 and 3 will be answered together since they are facets of the same problem. It seems clear that discounts must be uniform in nature and available to all on the same basis. A discussion of the question of uniformity of discounts in this context is not complete without reference to the so-called Robinson-Patman act (Title 15, §13 (c) USCA) which amended the Clayton anti-trust act and which governs the subject of uniform discounts. In the case of *Moog Industries Inc. v. Federal Trade Com.*, C. A. 8, 1956, 238 F. 2d 43 affirmed 355 U. S. 411 and 78 S. Ct. 377, 2 L. Ed. 2d 370, it was held that where competition between customers of the manufacturer and their competitors was keen, margins of profit were small, and the overall net profits were low, the federal trade commission could find that rebates which were denied by the manufacturer to some customers but granted to others who made purchases in larger amounts might probably result in substantial injury to competition within the meaning of the Robinson-Patman act. Other federal courts have held that volume discounts can be justified only where differences in cost of manufacture, sale, or delivery results from different methods or quantities in which commodities are sold or delivered to purchasers (See *American Can Co. v. Russellville Canning Co.*, C. A. Ark., 1951, 191 F. 2d 38).

Thus in the case of volume discounts, in order not to place manufacturers or distributors in the position of violating federal law, it should be made clear that volume is a consideration only where actual savings in cost, bookkeeping, delivery, etc., can be shown to accrue to the manufacturer or distributor by virtue of such volume sales.

In answer to question 4, if in the discretion of the director it is found necessary to fix allowable discounts, but only for the purposes of regulation as indicated in the discussion in question 1, resort may be had to such standards and criteria in fixing the allowable discount or usual trade discounts as are recognized by good business and accounting principles prevailing in the beverage industry within, however, the restrictions of law which preclude unfair competition.

In answer to question 5, it appears that in the final analysis the authority to fix "discounts in the usual course of business" should be exercised with two guideposts in mind. On the one hand, constant scrutiny should be given to discount practices in the industry in order to prevent the circumvention by the distributor or manufacturer of the tied house evil proscribed by §561.42, *supra*, (the evil in such case being the giving by the manufacturer or distributor to certain vendors of liquor of more favorable discounts so that in effect such discounts constitute the assistance by "gift" or "rebate" forbidden by §561.42 (1)). On the other hand, should the aforementioned practices develop so as to call for regulation

by the director then he should, in imposing the "allowable discount" do so in such a way as not to have his action constitute the indirect fixing of liquor prices at retail.

In exercising his discretion in this area, as hereinabove set out, the director should bear in mind the language of the supreme court in the case of *Liquor Store v. Continental Distilling Corp.*, (Fla.) 40 So. 2d 371, in which the Florida supreme court struck as unconstitutional Ch. 541, the so-called fair trade law. As the court said at p. 375:

... We have many times been confronted with price fixing statutes in one form or another. Throughout all our holdings we have recognized as basic that for a statute such as this to be upheld there must be some semblance of a public necessity for the act and it must have some relation to the public health, morals or safety. Further, the price fixing agency must be duly constituted by law and due notice of its action. All of which contemplates that the prices fixed must have some regard to reason besides having a public concern. ... Our conclusion is that the act is arbitrary and unreasonable and violates the right to own and enjoy property; one economic group may not have the sovereign power of the state extended to it and use it to the detriment of other citizens. In that case the legislation serves a private rather than a public purpose. The sovereign power must not be delegated to a private citizen to be used for a private purpose and especially where there is no state supervision. ...

I trust that the foregoing answers the questions posed by you.

062-91—July 5, 1962

Supersedes A.G.O. 055-120

TAXATION

AD VALOREM TAXES AGAINST PRIVATE WATER AND SEWER SYSTEMS—§1, ART. IX, §16, ART. XVI, STATE CONST.—§§192.01, 192.02, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTIONS:

1. Are water and sewer systems maintained by persons, firms or corporations for the use and benefit of others for compensation subject to ad valorem taxation in this state?
2. If the above question be answered in the affirmative, should such water and sewer systems be assessed as real or personal property?

The constitution (§1, Art. IX, and §16, Art. XVI, State Const.), the statutes (§192.01, F. S.), and the court decisions (*Lummas v. Miami Beach Cong. Church*, 142 Fla. 657, 195 So. 607; *West Va. Hotel Corp. v. W. C. Foster Co.*, 101 Fla. 1147, 132 So. 842; *Wood v. Ford*, 148 Fla. 66, 3 So. 2d 490) of this state provide for the taxation of all property having a situs in this state, unless expressly exempted by law. In *Devane v. Leatherman*, 113 Fla. 216, 151 So. 530, text 531, the court stated that "the law must conclusively presume that every property owner, not affirmatively shown to be exempt, is due some amount of taxes on his holdings for every tax year." "This is a democracy in

which every parcel of property is expected to bear its due portion of the burden of government, unless exempted" by the state constitution or statutes (*Bancroft Inv. Corp. v. City of Jacksonville*, 157 Fla. 546, 27 So. 2d 162, text 170). "Water, gas and electric companies are subject to taxation unless expressly exempted" (2 *Cooley on Taxation*, 4th Ed. 1947, §968). The works, pumps, pipes and equipment of water and sewer companies are property with a value and subject to taxation unless specifically exempted under some constitutional or statutory provision.

Examination of the Florida constitution, statutes and laws reveals no statute or law exempting privately owned water and sewer systems, and their pipes, mains, etc., from county and municipal ad valorem taxation. Question 1 is answered in the affirmative.

We come next to the question of whether water and sewer systems, especially their mains, pipes, and other transportation property, are to be classified as real or as tangible personal property. Section 192.02, F. S., provides that "for the purposes of taxation 'real property' shall be construed to include lands and all buildings, fixtures and other improvements thereon." A reading of division "III" of that annotation in 57 A. L. R. 869-877, entitled "what property of electric, gas, water, telephone or street railway company constitutes real property for taxation purposes" reveals an apparent, if not a real, difference of opinion among the reported cases.

In *Re Des Moines Water Co.*, 48 Iowa, 324, *Capital City Gaslight Co. v. Charter Oak Ins. Co.*, 51 Iowa 31, 50 N. W. 579; *Oskaloosa Water Co. v. Board of Equalization*, 84 Iowa, 407, 14 L. R. A. 296, 51 N. W. 18; *Colorado Fuel and Iron Co. v. Pueblo Water Co.*, 11 Colo. App. 352, 53 P. 232; *Monroe Water Co. v. Frenchtown Twp.*, 98 Mich. 431, 57 N. W. 268; *Grand Haven v. Grand Haven Waterworks*, 119 Mich. 652, 78 N. W. 890; *Shelbyville Water Co. v. People*, 140 Ill. 545, 30 N. E. 678, 16 L. R. A. 678; tend to the view that mains and pipes of water, gas, and similar companies are appurtenant to the main plant and the lands upon which located, and are in law real property.

But in *Memphis Gaslight Co. v. State*, 6 Cald. 310, 98 Am. Dec. 452 (Tenn.); *Shaw v. Welch*, 136 Kan. 736, 18 P. 2d 189; *Arkansas Natural Gas Co. v. Hope*, 142 Ark. 351, 218 S. W. 664; *Field v. Guilford Water Co.*, 79 Conn. 70, 63 A. 723; *Guilford-Chester Water Co. v. Guilford*, 107 Conn. 519, 141 A. 880; *Mulrooney v. Obear*, 171 Mo. 613, 71 S. W. 1019; *People v. Brooklin Board of Assessors*, 49 N. Y. 81; *Dunsmuir v. Post Angeles Gas Co.*, 24 Wash. 104, 63 P. 1095, mains and pipe lines owned by a utility located on public property or the property of others were held to be personal property and not real property. These cases seem to reject the theory that such mains and pipe lines are appurtenant to the plant property so as to make them in law a part thereof.

Other cases, under the circumstances there involved have held such mains and pipe lines to be part and parcel of the land itself and taxable as a part thereof, thereby rejecting both of the above discussed theories. Doubtless in many of these instances circumstances were such that the mains and pipe lines were not severable from the lands and could not be removed therefrom by the owner. In other cases the mains and pipe lines were located on rights of way owned by the water or other utility companies, and not on the lands of others.

We reach the conclusion that in Florida mains and pipe lines of water companies and other utilities located upon public lands, such as road and street rights of way, and upon lands of others under lease or other contracts of user, should be considered as tangible personal property subject to taxation in the taxing district or area wherein such mains and pipe lines are located. Mains and pipe lines located upon the lands where the plant is located or adjacent thereof, when owned or under long term lease or right, should be considered and deemed a part of the said plant. This rule is also applicable to subplants or substations.

These observations answer question 2.

This opinion supersedes and replaces AGO 055-129, of June 16, 1955.

062-92—July 6, 1962

TAXATION

SECTION 205.58, F. S.—PRESUMPTION, DOING BUSINESS AS
A MORTGAGE BROKER—CHS. 205, 494; §§205.01,
205.58, 494.02(3), 494.04, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Does the issuance of a mortgage broker's license pursuant to Ch. 494, F. S., raise a presumption that the person obtaining such a license is engaging in business as a mortgage broker within the purview of §205.58, F. S.?

Chapter 494, F. S., regulates the mortgage brokerage business in this state. Section 494.02(3), F. S., defines a mortgage broker as one "who for compensation, or in the expectation of compensation, either directly or indirectly makes, negotiates or offers to make or negotiate a mortgage loan." Section 494.04 provides that "no person shall act as a mortgage broker or mortgage solicitor without a license therefor," (emphasis supplied) obtained as required by said Ch. 494, F. S. The license fees imposed by said Ch. 494 are required to be "deposited in the state treasury and are hereby appropriated to the comptroller to be used in administering" said Ch. 494, F. S. This license imposed by Ch. 494, F. S., is clearly a regulatory fee or license and not one for general governmental purposes. It is not a business or occupational license for revenue purposes as are those imposed under Ch. 205, F. S.

Section 205.58, F. S., requires that "every person engaged in the business of trading, bartering, buying, lending or selling intangible personal property, whether as owner, agent, broker, or otherwise, shall pay a license tax of twenty-five dollars (per annum) for each place of business." (Emphasis supplied). Section 205.01 of said statutes provides in part that "no person shall engage in or manage any business, profession or occupation, for which an occupational license tax is required . . . unless a state license, or a state and county license, or a county license, as the case may be, shall have been procured from the tax collector of the county where the place of business may be located . . ." (Emphasis supplied.) In *Miami Beach College Corp. v. Tomlinson*, 143 Fla. 57, 196 So. 608, text 609, the court stated that "in its larger significance, the term business has reference to any livelihood or employment in which

one makes his living." The statement is made in 53 C. J. S. 556, §27, that "taxes imposed on businesses, occupations or trades ordinarily intend activities carried on for profit or livelihood, but do not extend to single acts..." Section 205.58, F. S., is clearly a revenue and not a regulatory measure, and the license tax imposed is for revenue and not regulatory purposes.

Section 494.04(11), F. S., requires that "every licensed mortgage broker shall have and maintain a principal place of business in the state for the transaction of business. The license shall specify the address of said principal place of business and shall be conspicuously displayed therein." This subsection further requires that each branch office display a duplicate of such mortgage broker's license in a conspicuous place in such branch office. Compliance with this subsection by the maintaining of a place of business and displaying the license as required by the statute would doubtless be prima facie evidence of a holding out for the transaction of a mortgage brokerage business. "It has been held that a person is not liable under a statute or ordinance authorizing a license tax to pursue a given occupation or business if he is not actually engaged in such occupation or business, or if he has no intention" of engaging in such a business. (See 53 C. J. S. 659, §47).

The requirement in §494.04(11), supra, that every licensed mortgage broker must maintain a principal place of business and conspicuously display his license therein, raises the presumption that such licensee is engaged in the business of a mortgage broker; however, this appears to be a rebuttable presumption when §205.58 becomes involved which is applicable only when the business is actually engaged in. We are, therefore, of the opinion that the issuance of a mortgage broker's license under and pursuant to Ch. 494, F. S., raises a presumption that the person obtaining such a license is engaged in the mortgage brokerage business; however, when applied to §205.58, F. S., this presumption is a rebuttable one. It is the burden of the mortgage broker licensed under Ch. 494, F. S., when not actually engaged in the mortgage brokerage business, to demonstrate to the satisfaction of the tax collector that he is not engaged in such business, else he is liable for the license taxes imposed by said §205.58, F. S.

These observations seem to answer the above stated question.

062-93—July 12, 1962

**REGULATION OF PROFESSIONS AND VOCATIONS
STATE BOARD OF CHIROPRACTIC EXAMINERS—POWERS
AND DUTIES—ENFORCEMENT OF CH. 460, F. S.;**

§§460.06, 460.13, 460.25, 460.29; CH. 120, F. S.

To: Florida State Board of Chiropractic Examiners, Tallahassee
QUESTIONS:

1. What are the general duties and responsibilities of the Florida state board of chiropractic examiners (hereinafter referred to as the board) under the provisions of Ch. 460, F. S.?
2. What authority does the board have to enforce its rules and regulations by suspension or revocation of a certificate, or by prosecution in the criminal courts?
3. How are the provisions of Ch. 460, F. S., and any rules adopted pursuant thereto affected by Ch. 120, F. S., cited as the uniform administrative procedure act?

4. Can the board by rule and regulation establish criteria to clarify, implement and make more specific certain terms or sections of the chiropractic law which will assist the board in determining matters relating to its jurisdiction?

5. Is it legal for the board to make rules relating to the practice of chiropractic which shall include the setting of standards for the conduct of chiropractors and chiropractic practices which would embrace ethical conduct, advertising limitations, limitations of treating, or diagnostic instruments, etc.?

6. Is a chiropractic clinic included in the language hospitals, sanitoriums or other related chiropractic institutions?

7. Would any of the foregoing rules adopted by the board to assist it to enforce and carry out its responsibilities under Ch. 460 be a legal basis for suspending or revoking a certificate of a chiropractic physician?

8. Where a licensee has been convicted of an offense involving moral turpitude and the conviction is appealed, can such conviction be made the basis of a revocation proceeding pursuant to §460.13(3)(c), F. S., prior to final disposition of the case on appeal?

9. Does an acquittal in a criminal case which involves acts or transactions which are specifically made grounds for revocation of a license bar the board from revoking the defendant's license after the acquittal?

10. Is there a time limitation within which revocation proceedings must be brought following the occurrence of the acts or transactions upon which such proceedings are based?

As a general rule a definitive legal opinion necessitates a particular fact situation, in absence of which it must follow that an opinion must be broad to permit of inclusion and exclusion of particular fact situations which may give rise to the application of a different rule of law. Accordingly, the answers to the above questions will be more in the nature of a brief discussion of the individual subject matters in which discussion I shall attempt to impart some of the general principles of law ordinarily applied by the courts.

AS TO QUESTION 1:

The powers and duties of the board are defined by §460.06, F. S., which generally states that it shall be the duty of the board to enforce the provisions of Ch. 460 as well as to prosecute violations thereof. The latter duty relating to prosecutions of violations is more fully defined by §460.25 whereunder the legislature has provided that the several state and county prosecuting attorneys shall prosecute persons charged with violations of the chapter. The latter section provides that the board shall assist such prosecuting officials by furnishing them evidence of violation of the chapter whenever the board possesses such evidence.

Additionally, the board is empowered to make rules and regulations not inconsistent with the provisions of the chapter as well as the making of rules and regulations to carry out the provisions of the chapter and as may be necessary to perform its duties. The board is also authorized under stated conditions to hold revocation or suspension hearings in conformance with the provisions of

§460.13, F. S., upon proper charges that a licensee has violated any provision of §460.13(3), F. S., which section sets out the sole grounds upon which licenses may be revoked or suspended by the board acting in its quasi judicial capacity.

Additionally, of course, the board has been conferred by law with the duties relating to the examination and licensing of applicants as well as individual applicants for licenses to practice as a chiropractor. The board is also required to license and regulate chiropractic hospitals in accordance with the provisions of §§460.29-460.39, F. S.

AS TO QUESTION 2:

The authority to suspend or revoke licenses by an administrative board is limited to the express provisions made therefor by the legislature. Section 460.13, F. S., contains the procedure for suspension and revocation of licenses or certificates, and subsection (3) thereof contains the specific grounds upon which suspensions or revocations may be had. Accordingly, except to the extent that a violation of a rule or regulation may also constitute a violation of the express grounds for revocation or suspension contained in the statute, such violation of a rule or regulation cannot be used as grounds for suspension or revocation.

Although violations of rules and regulations may not serve as grounds for revocation as above indicated, such regulations may frequently be enforced in a court of equity utilizing the court's injunctive powers. Of course, prior to enforcing a rule or regulation by the injunctive process, it must appear clear to the court that the rule sought to be enforced comes well within the authority of the board to promulgate and is not inconsistent with any of the provisions of the law as enacted by the legislature. Thus in each instance of rule enforcement by the judicial process, the validity of the rule must be beyond question both from the standpoint of the board's authority to adopt the rule as well as the constitutionality of the rule.

Many regulatory laws which confer rule making authority upon a board specifically provide methods for enforcement of such rules. Such provision does not appear to have been made in the case of the chiropractic law, and although the aforementioned resort to courts of equity is in many instances available, it would be well to consider an amendment to the law at the next legislative session making express provision for judicial enforcement of rules and regulations for the purpose of obviating any doubt that may exist in this regard.

AS TO QUESTION 3:

The provisions of Ch. 120, F. S., which is cited as the uniform administrative procedure act, are to be read and applied in conjunction with Ch. 460, F. S., and with respect to procedural matters, if there is a conflict between Ch. 120 and Ch. 460, the provisions of Ch. 120 would supersede those of Ch. 460.

It is important to note that the purpose and function of Ch. 120, F. S., is to provide certain minimal protection to persons whose rights and duties may be affected by any regulatory board. In most instances chapters creating regulatory boards already provide such minimum protection to persons whose rights are or may be affected by a board. Such minimum standards in general relate to requirements of hearing, notice thereof, the requirement that specific charges are brought to the attention of a licensee so that he may exercise his constitutional right to defend himself and so on. Addi-

tionally, Ch. 120 provides for the filing of rules and regulations with the secretary of state so that persons may be put on notice as to the existence and contents of rules and regulations promulgated by the various agencies or boards.

AS TO QUESTION 4:

Section 460.06, F. S., contains the board's rule making power. While the power thus granted enables the board to adopt rules, such rules must be in furtherance of and not inconsistent with the provisions of the statute. Thus the board cannot by rule declare a policy or establish criteria which goes beyond the statute or is inconsistent or contrary to such statutory provisions. For example, §460.13(3)(c) makes it a ground for license revocation that the licensee "has been convicted of a violation of any law involving moral turpitude." The board could not by rule declare that violation of certain specified laws involve moral turpitude unless in fact moral turpitude is involved. The cases and decisions in the courts of this country have developed the question of whether moral turpitude is involved in connection with specific violations. Thus, rather than adopt a rule specifying which violations of which laws shall be taken as being violative of §460.13(3)(c), it might be advisable to examine each fact situation on its own merits. Where the board is confronted with a specific situation wherein it wishes to determine whether §460.13(3)(c) has been violated so as to be the predicate for a revocation action, the fact situation ought to be given to the board's counsel for research to determine whether such a situation has been held by the courts of this or any other state to involve moral turpitude, or in absence of such a case decision, to determine whether such an inference may reasonably arise from the clear meaning of the phrase "moral turpitude" when taken in conjunction with the crime committed. Since not all crimes necessarily involve moral turpitude, an independent inquiry ought to be made in each instance.

AS TO QUESTION 5:

The board's authority to adopt rules and regulations relating to the foregoing cannot exceed the limitations or provisions made in the statute relating to the individual foregoing subject matters. A safe rule to follow is to be guided by the provisions of the statute and to resort to the rule making power only where clearly necessary to carry out the provisions of the statute without exceeding the limitations or standards set by the legislature. Most instances of conduct which are inimical to the public's interest can readily be shown to come within the statutory prohibitions, limitations and provisions.

AS TO QUESTION 6:

Section 460.29(2), F. S., defines the meaning of a chiropractic hospital, sanatorium or other related institutions as any place in which any accommodation is maintained, furnished or offered for hospitalization by chiropractic methods. The following subsection further defines the word "hospitalization" to mean the reception and care of any person for a continued period longer than 24 hours for advice, diagnosis and treatment purposes. Thus a so-called "clinic" would come within the purview of the "hospital law" if said clinic in fact accepts patients for treatment, advice or diagnosis for periods in excess of 24 hours irrespective of the name used to describe such place.

AS TO QUESTION 7:

Violations of laws relating to the operation of clinic hospitals

are not grounds for suspension or revocation of the individual's license unless the particular incident or transaction whereby the hospital laws were violated also constitute any one of the express grounds for revocation of an individual's license contained in §460.13 (3), F. S.

AS TO QUESTION 8:

The weight of authority as to revocation of a license based on "conviction" appears to be that "where an appeal is taken in the criminal case, there is no conviction within the meaning of the revocation statute until rendition of a judgment following the appeal." (41 Am. Jur., Physicians and Surgeons, §55, p. 181).

In *Page v. State Board of Medical Examiners*, 193 So. 82, the Florida supreme court held that a verdict by the jury finding a physician guilty under an indictment was not a "conviction" within the Florida statute authorizing the state board of medical examiners to revoke a license to practice medicine for conviction of a felony where a sentence was never entered on the verdict, but the physician was placed on probation under the supervision of a probation officer. In view of the strict interpretation of the word "conviction" as used in a revocation statute which has been accorded thereto by the supreme court, it is my opinion that should the question arise with respect to a "conviction" appealed from, our courts would adhere to the view expressed in 41 Am. Jur., supra, whereunder the final disposition of the appeal must be awaited prior to any revocation proceedings.

AS TO QUESTION 9:

Although there appears to be a division of authority on this question, the Florida supreme court seems to have approved the view that an acquittal in a criminal prosecution will not bar a proceeding to revoke one's license by the state board of medical examiners based on the same offense as the criminal prosecution (*State v. Driskell*, 190 So. 461). While the latter case involved a medical practitioner, I am presently inclined to the view that the same rule would obtain with respect to the revocation of a chiropractic practitioner's license. However, before invoking this rule of law, the state board concerned should give due regard to the question of the sufficiency of the evidence which it could muster in support of the charges preferred against a licensee. The record in the criminal case resulting in acquittal should be scrutinized to determine the reason for the acquittal and the board should proceed with revocation proceedings in such a case only if it is felt, after due consultation with counsel, that whatever deficiencies existed in the criminal case can be overcome in the administrative proceeding by additional evidence clearly showing the guilt of the licensee.

AS TO QUESTION 10:

No specific time limitation within which revocation proceedings must be brought is found in §460.13, F. S., relating to suspension and revocation of certificates. Our supreme court has held in a case involving a practicing physician and the state board of medical examiners where the board brought charges against a physician almost four and one-half years after the alleged violation that "this was an unconscionable time to wait to begin case proceedings, but we find no statute of limitations which bar such proceedings because of the running of time." (*In re Weathers*, 31 So. 2d 543). In view of the court's holding in the *Weathers* case, it would appear that great latitude is given to the discretion of the board in deter-

mining how soon after the violation revocation proceedings should be brought.

However, in considering this question, the board ought not be unmindful of the court's observation in the Weathers case relating to "...an unconscionable time to wait to begin these proceedings..."

As indicated at the outset of this letter, the foregoing discussion by question and answer has necessarily been unspecific for want of a definitive set of facts. May I suggest, should you wish to inquire further concerning a particular fact situation, that you make available to me the particular facts upon receipt of which I shall be happy to advise you thereon.

062-94—July 18, 1962

TAXATION

POWER AND DUTY OF BOARD OF COUNTY COMMISSIONERS SITTING AS BOARD OF TAX EQUALIZATION—

§§193.06, 193.11-193.14, 193.22, 193.25, 193.27, 199.05,
199.12, 200.06, 200.20, F. S.; §1, ART. IX,
§7, ART. X, STATE CONST.

To: *Farris Bryant, Governor, Tallahassee*

QUESTIONS:

1. Do boards of county commissioners sitting as boards of tax equalization have jurisdiction to equalize tax assessments coming to their attention, although no complaint is filed as to such assessment, when it is clearly above or below the ratio of assessed value to full or true cash value used in assessing other property?

2. May county boards of education complain to the county boards of tax equalization when under valuations as fixed by the county assessor of taxes affect the operation of the county public schools?

The purposes of tax equalization meetings, before boards of county commissioners sitting as boards of tax equalization, held under and pursuant to §§193.25, 199.12 and 200.20, F. S., appear to be "hearing complaints and receiving testimony" as to the correctness of the valuations as made by the county assessor of taxes, and "perfecting, reviewing and equalizing the assessments" as made by the assessor of taxes. In order to perfect, review and equalize the assessments as made by the assessor of taxes the said board "may raise or lower the value fixed by the county assessor of taxes on any particular piece of real estate, or item or items of personal property." (§§193.27, 199.12 and 200.20, F. S.) Although, under the above mentioned statutes, the county board of tax equalization is authorized to hear complaints as to the correctness of the valuations made by the assessor of taxes, we find nothing in said statutes making a complaint a necessary predicate for action by that board to equalize any assessment valuation of property made by the assessor of taxes.

Under §193.25, F. S., "the county assessor of taxes shall complete the assessment rolls of their respective counties on or before the first Monday in July in every year, on which day such assessors shall meet with the board of county commissioners at the clerk's office of their respective counties for the purpose of hearing complaints and receiving testimony as to the value of any property,

real or personal, as fixed by the assessor of taxes; of perfecting, reviewing and equalizing the assessment...." Under §193.27, F. S., *"the board of county commissioners may equalize the assessment of the real estate or personal property in their respective counties, and for that purpose may raise or lower the value fixed by the county assessor of taxes on any particular piece of real estate, or item or items of personal property...."* Section 199.12, F. S., grants the board of county commissioners a like power of equalization of the assessments of intangible personal property, as does §200.20, F. S., as to tangible personal property. Under said §193.27, the board of equalization *"may raise or lower the value fixed by the county assessor of taxes on any particular piece of real estate, or item or items of personal property."* Under §§199.12 and 200.20, F. S., the board of equalization may make changes in the valuation of tangible and intangible personal property as may be necessary to equalize the assessments.

Section 1, Art. IX, State Const., requires that the Florida legislature *"prescribe such regulations as shall secure a just valuation of all property, both real and personal,"* for purposes of ad valorem taxation. This requirement has been complied with by the legislature in §§193.06, 193.11, 193.12, 193.13, 193.14, 193.22, 199.05, and 200.06, F. S., requiring that taxable property be assessed at its *"full cash value,"* or at its *"true cash value."* In *Cosen Inv. Co. v. Overstreet*, 154 Fla. 416, 17 So. 2d 788, it was contended that the plaintiff's property had been assessed at its full cash value while other properties were assessed at less than full cash value, and that in the light of *Camp Phosphate Co. v. Allen*, 77 Fla. 341, 81 So. 503, plaintiff's property should be reduced in value and placed on a par with other properties. This contention was rejected on the ground that the adoption of §7, Art. X, State Const. (the homestead tax exemption amendment), of necessity changed the rule announced in *Camp Phosphate Co. v. Allen*, supra. The court remarked that *"to perpetuate the practice of assessing all property at less than that directed by the statute (§193.11, F. S.) would necessarily result in favoring the homesteads."* Since the adoption of §7, Art. X, State Const., exempting homesteads to the extent of \$5,000, it is necessary to assess all property at 100% of its full or true cash value to render the tax burden uniform and equal. In *State v. McNayr*, Fla., 133 So. 2d 312, text 316, the court remarked that *"the just valuation mandated by the constitution and extended to the legislative requirement of 'full cash value' imposes the responsibility on the taxing official to value and apply the rule to each individual parcel of land."* Any assessment of taxable real or personal (tangible and intangible) property at less than its true or full cash value is unauthorized and creates an inequality when compared to the other taxable property.

"County commissioners have no general power in making tax assessments but only such special or limited power as is specifically conferred by statute to secure equalization of tax values." (*Sparkman v. State*, 71 Fla. 210, 71 So. 34, text 41). In effect the county board of tax equalization is an appeal board from the action of the tax assessor in fixing the valuation of the property assessed. Tax equalization boards are agencies *"established to carry into effect the general rule of equality and uniformity of taxation required by constitutional and statutory provisions."* (84 C. J. S. 979, §512). Such boards have no power or authority to make blanket increases or decreases but only to equalize. (*Armstrong v. State*, Fla. 69

So. 2d 319, text 321 and 322). Attorney General Thomas F. West (subsequently a justice of the supreme court of Florida), by his opinion of June 6, 1931, said that "under the present statutes (now §193.27, F. S.) the county commissioners have power, in equalizing the assessment of the real and personal property in their respective counties, to raise or lower the value fixed by the county assessor on any particular piece of real estate or item or items of personal property, and in so doing may change the total valuations or footing made by the tax assessor." (1913-1914 AGO 185). Attorney General Fred H. Davis (subsequently a justice of the supreme court of Florida), by his opinion of March 18, 1929, stated that "the statutes (now §193.27, F. S.) make it the duty of the board of county commissioners, as a board of equalizers, upon the completion of the assessment roll, together with the county tax assessor, to review, perfect and equalize such assessment, and such duty devolves upon them whether there be any complaint or not." (1929-1930 AGO 387).

Attorney General J. B. Johnson, by his opinion of June 18, 1926, held that the purpose of §§723 and 725, R. G. S., 1920, (now §§193.25 and 193.27, F. S.) "was to give the county commissioners power and authority to equalize taxes, yet in my opinion they would have the authority to raise values when it was clear to them that the values were unreasonably low." (1925-1926 AGO 91 and 92). The present attorney general, by his opinion of Aug. 22, 1951, stated that "*should the board of tax equalization find that the valuation placed by the tax assessor on any particular piece or parcel of taxable property is not in line with that placed upon the property generally the board may adjust the valuation placed upon that particular piece or parcel of land so as to make it conform to the valuation placed upon the taxable property of the county as a whole.*" (1951-1952 AGO 298-300). We are, therefore, of the opinion that boards of county commissioners, sitting as boards of tax equalization, under their power to "raise or lower the value fixed by the county assessor of taxes on any particular piece of real estate, or item or items of personal property" (§193.27, F. S.) may equalize the assessment on any particular piece or parcel of real property when the valuation placed thereon is openly and patently out of line with the other assessments made by the county assessor of taxes. If such assessment is on a valuation clearly out of line with the assessments generally, clearly indicating error or some patent misconstruction of the taxing laws, the board of equalization may, under §193.27, F. S., either lower or raise such valuation so as to put it in line with the other assessments generally.

County boards of public instruction represent the people of the county in connection with the maintenance and operation of the public schools of the county, and are, therefore, on behalf of the county, interested parties as to both taxation and education. An assessment materially below the level of other assessments results in the reduction of county funds for education. We, therefore, see no reason why boards of public instruction may not direct the attention of the county board of tax equalization to under valuations and other matters directly affecting the finances for the operation of the public schools of the county.

In the light of the above and foregoing each of the above stated questions is answered in the affirmative.

062-95—July 25, 1962

TAXATION**TAX EXEMPT STATUS OF HOMES FOR ELDERLY PERSONS OPERATED BY RELIGIOUS AND SIMILAR GROUPS AND ORGANIZATIONS—§1, ART. IX, AND §16, ART. XVI, STATE CONST.; §192.06(3), F. S.***To: J. Hardin Peterson, Jr., City Attorney, Lakeland***QUESTION:**

When are homes for the elderly and similar establishments operated by or under the control of religious, charitable, and similar organizations entitled to exemption from taxation?

Section 1, Art. IX, and §16, Art. XVI, State Const., limit exemptions from ad valorem taxation, except where otherwise provided under the state or federal constitutions, to such property as is held and used exclusively for religious, scientific, municipal, educational, literary or charitable purposes. (*L. Maxcy, Inc., v. Fed. Land Bank*, 111 Fla. 116, 150 So. 248, text 249; *State v. St. John*, 143 Fla. 544, 197 So. 131, text 134; *State v. Doss*, 146 Fla. 752, 2 So. 2d 303, text 304).

Your request for opinion poses the question of the status of homes for the aged owned and maintained by the Presbyterian Homes, Inc., a nonprofit corporation, evidently having its situs in Lakeland. This corporation appears to have been organized with the consent, if not the approval, of the Presbyterian church organization or some agency thereof. We gather from the information before us that this nonprofit corporation was organized and incorporated under the statutes and laws of Florida, and operates as a nonprofit corporation. The purpose of this corporation, as stated in its charter, is to "provide a home where elderly people can abide in comfort, harmony and peace in a Christian atmosphere." This corporation appears to have acquired certain lots or parcels of land lying and being in Lakeland, upon which now exist living quarters sufficient to accommodate and house numerous persons. This project appears to have been primarily designed for accommodating and housing retired ministers and missionaries and other religious workers. This project does not appear to be entirely charitable, religious, scientific, educational or literary, in that accommodations and housing are charged for under some circumstances.

From the record before us it seems that most of the guests pay the actual cost of their upkeep which is determined and arrived at on a year-to-year basis. "It has been determined from these reports that actual cost of maintaining the premises and furnishing the food, nursing care and the like amounts to \$150 to \$160 per month per guest and this is the sum paid by those occupants who are financially able to do so. However, other guests are accepted and maintained in the home for lesser amounts and in some cases no charge at all. The deficit caused by such operation is made up by contributions of the various churches in the synod and from various personal donations by members of these churches and other charitably minded citizens."

Section 16, Art. XVI, State Const., provides that "the property of all corporations . . . shall be subject to taxation unless such property be held and used exclusively for religious, scientific, municipal,

educational, literary or charitable purposes." Under this section, as well as §1, Art. IX, State Const., *ownership and utilization of the property* are the criteria for determining its exemption from taxation. Its right to exemption is to be determined, not by the ownership and purposes alone, but by both the *ownership and use*; that is the use to which the property is actually put (*Simpson v. Bohon*, 159 Fla. 280, 31 So. 2d 406; *Riverside Acad. v. Watkins*, 155 Fla. 283, 19 So. 2d 870; *State v. Doss*, 146 Fla. 752, 2 So. 2d 303; *State v. St. Johns*, 143 Fla. 544, 197 So. 131; *Lummus v. Florida Adirondack School*, 123 Fla. 810, 168 So. 232; *University Club v. Lanier*, 119 Fla. 146, 161 So. 78; *Rast v. Hulvy*, 77 Fla. 74, 80 So. 750). Ownership is not sufficient; there must also be utilization for one or more of the purposes mentioned in §1, Art. IX, and §16, Art. XVI, State Const. Although property may be owned and held by an eleemosynary corporation, trustees, or otherwise, for one or more of the purposes mentioned in said sections of the state constitution, such ownership and purposes are not of themselves sufficient for tax exemption; there must also be a use for said purposes.

The command of said §16, Art. XVI, State Const., to tax all corporation property needs no legislation to make it effective. (*Lummus v. Miami Beach Congregational Church*, 142 Fla. 657, 195 So. 607, text 608; *Fleischer Studios v. Paxson*, 147 Fla. 100, 2 So. 2d 293, text 294). Before property of a corporation, whether for profit or nonprofit, may be exempted from taxation it must be *held and used exclusively* for some religious, scientific, municipal, educational, literary or charitable purpose. Whether an item or parcel of property is being held and used exclusively for some religious, scientific, municipal, educational, literary or charitable purpose is primarily a question of fact to be determined by the tax assessor in the first instance. In *Fellowship Foundation, Inc.*, a nonprofit corporation *v. Paul*, as Tax Collector, Fla. 86 So. 2d 808, text 810, the court said that "*the fact that a charge was made for rooms is not necessarily fatal to the contention of the plaintiff*." See *Miami Battlecreek v. Lummus*, 140 Fla. 718, 192 So. 211, where we held that a combination hospital, educational and scientific corporation might be tax-exempt even though patients who were able to pay were charged for services rendered, and *Orange County v. Orlando Osteopathic Hospital, Fla.*, wherein we affirmed this holding." These cases show that a charge is not in and of itself conclusive evidence that there is no religious, scientific, educational, literary or charitable use, although it may raise such a presumption.

Although property may to a minor extent be used for charitable purposes, its major use seems to be the determining factor (*Johnson v. Sparkman*, 159 Fla. 276, 31 So. 2d 863, text 864). In this case the court remarked that "so far as the record discloses the use of the property in question for charitable or educational purposes is a mere incident to its main use. To bring it within the constitutional exemption it must be actually occupied and used exclusively for one or both these purposes.... Property exempt from taxation under the constitution for charitable and educational purposes has reference only to such property as is dedicated to the public and used exclusively to that purpose or to such extent as section 192.06, Florida Statutes, defines." *State v. Doss*, 146 Fla. 752, 2 So. 2d 303, text 304, seems to have involved a four-story building, the top four stories of which were used as a medical center "for charitable purposes," with the first story being rented for general business purposes, with the rents going exclusively to the

operation of the medical center in connection with its charities. The building was held to have been used for charitable purposes within the purview of §192.06(3), F. S.

In *Simpson v. Bohon*, 159 Fla. 280, 31 So. 2d 406, the basement and ground floor of the Elks club building in downtown Jacksonville had been rented for business purposes, consisting of about 43% of the said building, with the remainder, about 57% of the building, being used for lodge or fraternal purposes. A large portion of the rent so received was used for the purpose of paying off a mortgage encumbering the said building. The 57% of the building used for lodge or fraternal purposes was exempted from taxation, with taxes being imposed against the said 43% of the said building. The use of the rentals for the purpose of paying off the mortgage was held not a use for some "religious, scientific, municipal, educational, literary or charitable purpose," and the exemption was denied. No showing is made that at least 25% of the building is or will be used for educational, literary, benevolent, fraternal, charitable or scientific purposes so as to bring it within the purview of §192.06(3), F. S., as amended in 1961.

Under §192.06(3), F. S., real property of educational, literary, benevolent, charitable and scientific institutions within this state may be entitled to the exemption where not more than "seventy-five per cent of the floor space of said building or property is rented and the rents, issues and profits of said property are used for the educational, literary, benevolent, fraternal, charitable and scientific purposes of said institution..." Under this statute, for example, where 30% of a building is held and used exclusively for one or more of the mentioned purposes, the property may still be entitled to tax exemption if the rentals, issues and profits are used exclusively for one or more of the mentioned purposes. This statute, where its conditions are met, would seem to be applicable to homes for the aged provided by religious organizations. Should excessive wages or other compensation be paid for the care, maintenance and operation of the home for the aged, such fact would seriously pose the question of whether or not the home was actually being operated as a religious or charitable institution or as a profit producing organization.

In conclusion we hold that homes for the elderly and similar establishments operated by or under the control of religious, charitable, or similar organizations are entitled to exemption from taxation when, and only when, their properties are held and used exclusively for one or more of the purposes mentioned in §1, Art. IX, and §16, Art. XVI, State Const. If such property is used to any appreciable extent for other purposes its right to tax exemption is seriously doubted.

062-97—July 26, 1962

**PUBLIC OFFICERS, BOARDS AND OTHER AGENCIES
AUTHORITY TO EXPEND PUBLIC MONEYS FOR EDUCATIONAL
COURSES FOR ASSISTANTS AND EMPLOYEES**

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

May state and county public officers, boards, commissions, etc., incorporate in their office budgets, and pay therefrom, the expenses of educational courses for

their assistants and employees covering various phases of the work and duties of such offices?

Because of the nature of association meetings of public officers and their assistants and employees, and to coordinate the methods processes used in their offices, this office by its opinion 058-89 of March 11, 1958, (1957-1958 AGO 587) held that county officers, where they are members of such associations, when properly budgeted, may pay from their office funds the per diem and travel expenses incurred by themselves and their assistants and employees when attending such meetings. Although such meetings tend to educate such officers and their personnel in the operation of their offices, such educational services differ greatly from that contemplated by the above question.

It appears to me that the answer to your question turns on the nature of the particular educational program for which expenditures of public funds are to be made as there is no authority for the expenditure of public funds for private benefit. Although indirectly beneficial to the county, any type of formal educational program, be it a short course, university extension course, or other similar type, is basically of personal benefit to the individual taking such a course; hence, no authority for the payment of expenses in connection therewith from public funds exists in the absence of specific legislative authorization. To us there is a distinction between the expenses incurred in attending conventions in this state and in bearing the expenses of educating personnel for the operation of a public office. There is clearly no authority for expenditures from public funds to provide public employee training or education of a formal nature, although such training may indirectly benefit the public. Public employees when employed should have the basic training necessary for their employment. There is no general rule which may be applied equally to all factual situations—each case must stand on its own—and in the consideration of each case the primary test to be applied is whether the training program is one which, although designed to improve the efficiency of the employee, will benefit the public. Unless the training will be of direct public benefit it may not be given, in the absence of specific legislative authority. Training and education of a formal nature for employees to fit them basically for the performance of their duties, as distinguished from training specifically designed to improve the efficiency of a qualified employee, may not be given at public expense. In the latter classification are those seminars conducted by the assessment standards division of the state comptroller's office, the training given recruit highway patrolmen, and similar seminars and courses designed, not to educate for particular services, but to increase the efficiency of a duly qualified employee.

We, therefore, answer the above stated question in the negative except in those instances, if any, where clear provision is made for such education and training in some applicable statute or law.

062-98—July 26, 1962

**COUNTY SCHOOL SYSTEM
HIGH SCHOOL PRINCIPAL—SEEKING ELECTION TO AND
SERVING IN ELECTIVE OFFICE**

*To: Thomas D. Bailey, State Superintendent of Public Instruction,
Tallahassee*

QUESTIONS:

1. Is there any law that would prohibit a full time school principal from seeking election to the board of county commissioners?

2. If elected, could the principal, as a full time employee of the county board of public instruction, also serve as a member of the board of county commissioners?

The constitutional prohibition against holding two offices would not apply to the question at hand since the position of school principal is not a public office.

It should be pointed out, however, that the position of school principal is a full time position and it would appear that it would be difficult if not impossible for a school principal to give his full attention to his duties and at the same time properly discharge the numerous and time-consuming duties of a county commissioner.

It would also appear that if the same individual attempted to hold the job of school principal and at the same time discharge the duties of a county commissioner many questions might arise from time to time which would involve a conflict of interests between the two positions which could be against public interest.

In the final analysis, both questions must be answered as follows: (See §§ 177 and 178, state board of education regulations regarding absence from duty of school employees.)

There is no specific state law which would prevent a school principal from running for the office of county commissioner and if elected, serving in this capacity. The position of school principal, however, is full time employment subject to the policies of the county school board and if it appeared to the county board that a conflict of interest might arise or that simultaneous service as a county commissioner would unduly interfere with the principal's discharge of his duties as a school board employee, the board could by appropriate regulation require the principal to resign if he desired to hold office as county commissioner.

062-99—August 1, 1962

**TAXATION
DOCUMENTARY STAMP TAXES—CONTRACT OF SALE
SUBJECT TO MORTGAGE INDEBTEDNESS—AGO 062-80**

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

What is the measure of documentary stamp taxes required where the interest of the vendor in a contract to sell and convey real property is conveyed or assigned to a third party, when the said real property is subject to an outstanding mortgage encumbering the said real property?

The answer to this question was answered by AGO 062-80 of June 11, 1962, except as to the effect of the outstanding mortgage encumbering the real property which is the subject matter of the transaction. In this connection see AGO 061-77 of May 12, 1961, and *Zimmerman v. Hill*, Fla., App. 100 So. 2d 431, *Spinney v. Winter Park Bldg. and Loan Ass'n*, 120 Fla. 453, 162 So. 899, text 903 and 904 and *Alabama-Florida Co. v. Mays*, 111 Fla. 100, 149 So. 61, text 64. In these cases it was held that "where a grantee takes a conveyance subject to a mortgage, he will be presumed to have included the mortgage debt in the purchase price." To the same effect see also 59 C. J. S. 561, §397. Under the circumstances set out in the above question, and under the rule announced by the above mentioned authorities, there is a presumption that the mortgage obligation was included in the purchase price to be paid. This is a presumption which may be overcome by competent evidence.

In the absence of sufficient competent evidence to the contrary, the mortgage obligation should be included when imposing documentary stamps where the interest of a vendor and a contract to sell conveyed real property is conveyed or assigned to a third person where such real property is subject to an outstanding mortgage.

062-100—August 2, 1962

STATE OFFICERS AND EMPLOYEES

CONSTRUCTION OF §§122.16, F. S.—DEFINITION OF "RE-EMPLOYMENT"—§§122.02 AND 122.061, 455.01, 458.04, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

May a person, retired under §122.08, F. S., legally serve as a member of an administrative board, as defined in §455.01, F. S., without violating §122.16, F. S., especially should he waive the compensation provided for such members by the applicable statute?

Under most of the statutes creating administrative boards and defining their powers, duties and authority, provision is made for compensating the board members, such compensation varying from board to board usually ranging from about \$10 per day to \$25 per day. For example, §458.04, F. S., provides compensation for members of the board of medical examiners in addition to reimbursement of expenses under §112.061, F. S., of "ten dollars per day, or any part of a day, while attending official board meetings, but not to exceed twelve meetings per year." Similar provisions are found in §§459.21, 460.21, 461.13, 462.09, 463.18, 464.051, 465.051, 466.20, 467.04, 470.06, 471.09, 473.21, 474.06, 475.08, 476.18, 482.101, and other sections of the Florida Statutes. These statutes relate only to the compensation of board members when attending official meetings of the said boards. We do not here consider the effect of compensation being paid a board member for acting as an inspector, enforcement agent or other employment for a fixed consideration. We are here concerned with the effect of said per diem payments made to retired state or county officers or employees.

Section 122.16, F. S., provides that "any person who has accepted and is receiving retirement compensation under this chap-

ter shall have such compensation suspended during any period of *reemployment* in any capacity whatsoever by the state or any political subdivision or any department, branch or agency thereof" (Emphasis supplied). We are concerned with the meaning of the word "reemployment" as used in said §122.16, F. S. Section 122.02(1), F. S., defines "state and county officers and employees" as including "all *full-time* officers or employees who receive compensation for services rendered from state or county funds . . . ; provided that such compensation, in whatever form paid, shall be specified in terms of *fixed monthly salaries* by the employing state or county agency, or state or county official. . . ." (Emphasis supplied.) A state or county officer or employee as contemplated by Ch. 122, F. S., is a *full-time* officer or employee who is compensated by a *fixed monthly salary*.

By reference to the above mentioned statutes relating to the compensation of members of administrative boards, we find that many of them provide a fixed sum "per day, or any part of a day, while attending official meetings, but not to exceed twelve meetings per year," or other limited number of meetings. The payment of compensation when and as the administrative board meets is not a fixed monthly salary, nor are they full time officers within the contemplation of §122.02, F. S. Their connection with the administrative board of which they are members is, at least in most cases merely incidental to their main employment, profession or work. This leads to the conclusion that membership on an administrative board, where compensation is paid on a per day basis, and only during meetings, does not make them state or county officers or employees within the purview of §122.02(1), F. S. However, we do not think that an administrative board may pay one of its members, or even an employee, when such member or employee is working on a weekly, monthly or other basis, over an extended period of time without such member or employee being within the purview of said §122.02(1), F. S.

Under §122.16, F. S., a person drawing retirement compensation is prohibited by said section "from receiving compensation and salary at the same time." However, in the light of the definition of the *term salary*, as used in Ch. 122, F. S., (§122.02(3), F. S.), as meaning a fixed monthly compensation, we are unable to say that the payment of a per diem while attending board meetings would be a salary within the purview of the above quoted provision from §122.16, F. S.

The above question as drafted is answered in the affirmative; although we are of the view that the retiree may accept the per diem compensation allowed by the statute for attending meetings, we are not in position to positively advise that such per diem would not be held a "salary" by the supreme court although our best judgment is that it is not a salary. Those persons electing to draw their said per diem must take their chance that such a holding might be made by the courts.

062-101—August 3, 1962

TAXATION

ASSESSMENT OF LANDS USED FOR AGRICULTURAL PURPOSES—MEASURE OF VALUATION—

CONSTRUCTION OF §193.11(3), F.S.—

§§193.06, 193.11, 193.12-193.14,

193.22., F.S.; §7, ART X,

STATE CONST.

To: *Farris Bryant, Governor, Tallahassee*

QUESTION:

What is the measure of valuation to be used by county assessors of taxes in this state when assessing lands used for agricultural purposes as defined in §193.11(3), F. S.?

Said §193.11(3), F. S., provides that "all lands being used for agricultural purposes shall be assessed as agricultural lands upon an acreage basis, regardless of the fact that any or all of said lands are embraced in a plat of a subdivision or other real estate development." The statute then defines what was intended by the use of the term "agricultural lands." Nowhere in said subsection, or in the section itself, is there any requirement that "agricultural lands" be assessed on other than a full or true cash value. We note that "any demand for a reassessment of such lands for agricultural purposes shall be subject to the severest scrutiny of the county tax assessor to the end that the lands shall be classified property."

It was demonstrated in our opinion 062-94 of July 16, 1962, that under the constitution and statutes of this state, real property, as well as personal property, is required to be assessed for ad valorem taxes on the basis of *its full cash value* or true cash value, both terms being used in the Florida statutes. The rule was adopted by the supreme court of this state in *Cosen Inv. Co. v. Overstreet*, 154 Fla. 416, 17 So. 2d 788, that since the adoption of §7, Art. X, State Const., (the homestead tax exemption amendment), assessment of real property was required at full cash value, otherwise there will be an inequality between taxation against homesteaders and against nonhomesteaders. In its opinion the court, relative to a demand for assessment at less than full cash value, held that to grant such a demand would result in an assessment rendering unequal the tax burden of the county. The cash or full cash value has been held to be

the amount of money that a property would bring in the market, with a fair and reasonable time within which to procure a purchaser at the existing market value; the fair or reasonable cash price for which property can be sold in the market; the price property would sell for at cash sale, but not at a forced sale; the price which property would sell for in cash when offered for sale by a person desiring, but not compelled, to sell, and bought by a person desiring, but under no necessity, to buy. (14 C. J. S. 20).

Also as

the amount at which a property would be appraised if taken in payment of a just debt due from a solvent debtor . . . ; the price which the property will bring when offered

for sale by one who desires to sell, but is not compelled to do so, and is bought by one who desires to purchase, but is not compelled to do so. (14 C. J. S. 21).

See also definition of full cash value in 17 Words and Phrases 774-777.

The supreme court of this state in *Hillsborough County v. Knight and Wall Co.*, 153 Fla. 346, 14 So. 2d 703, text 705, said valuation "for purposes of taxation, is to be determined by taking into account not one, but all, favorable and unfavorable circumstances that would control the admeasurement of its present value were it placed upon the market to be sold by the owner." The following expression also appears in said opinion: "If similar property is commonly bought and sold the price which it brings is the best test of the value. . . ." It is noted that the court in the last above mentioned case said that valuation for ad valorem taxation "is to be determined by taking into account not one, but all, favorable and unfavorable circumstances" bearing upon valuation.

Section 193.11(3), F. S., above quoted, requires that "lands being used for agricultural purposes shall be assessed as agricultural lands upon an acreage basis," but, notwithstanding this provision in said subsection, no formula is given for fixing its value and nothing therein requires valuation based on agricultural use alone. Any valuation of agricultural lands for purposes of ad valorem taxation, on a basis of less than full or true cash value, would be violative of §§193.06, 193.11, 193.12, 193.13, 193.14, and 193.22, F. S., as well as the rule announced in *Cosen Inv. Co. v. Overstreet*, supra. To value agricultural lands by taking into consideration only one, and not all circumstances going to the valuation of the lands used for agricultural purposes, would likely result in a valuation less than the full or true cash value required by the statutes above mentioned and by *Cosen Inv. Co. v. Overstreet*, supra. There is, so far as we are advised, no statute, rule or regulation specifically limiting the use of agricultural lands to such a use and prohibiting such lands being used for some other purpose. To use a formula for ascertaining full cash value that is incomplete and fails to take into consideration all applicable elements necessary to fix a true full cash value would be violative of §7, Art. X, State Const., as construed in *Cosen Inv. Co. v. Overstreet*, supra. The use of a formula for fixing a valuation on only a small percentage of the valuation placed on a parcel of land for the prior year suggests the use of wrong formulas one or the other year.

Under §193.11(3), F. S., providing for a classification of lands as agricultural lands, there is no authority for using a different formula for fixing full cash value of such lands than that used for fixing the full cash value of other lands, there being no requirement that a different rule be applied under said subsection (3).

062-102—August 3, 1962
Supl. Aug. 17, 1962

TAXATION

SALES TAXES—MOTOR VEHICLES, "M" SERIES OR DEALERS' DEMONSTRATION TAGS— §§212.05, 212.08, 320.08, 320.13; CH. 212, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Are motor vehicles bearing "M" series, or dealers'

demonstration license tags entitled to exemption from sales and use taxes under Ch. 212, F. S.?

Section 212.05, F. S., imposes sales and use taxes at the rate of 3% on the sale or use of tangible personal property in Florida, the same to be computed as provided in and by said section. Motor vehicles are tangible personal property within the purview of said §212.05. Section 212.08(3), F. S., reduces the said sales and use tax on motor vehicles to 1% "on the sale (including occasional or isolated sales) or rental to, the use, consumption or storage for use in this state of motor vehicles." This subsection further provides that

No title certificate shall be issued by the motor vehicle commissioner on any motor vehicle unless there be filed with such application for the certificate a receipt issued by an authorized motor vehicle dealer, or by a designated agent of the comptroller or by the comptroller evidencing the payment of such tax *where the same is payable.* (Emphasis supplied.)

Motor vehicles sold in this state, unless entitled to specific exemption under some statute or law, are subject to a 1% sales tax as aforesaid. Motor vehicles subjected to "use" in this state, when not purchased in this state and a sales tax paid thereon, are subject to a 1% use tax. The term "use" as here employed "includes the exercise of any right or power over tangible personal property incident to the ownership thereof, or interest therein, except that it shall not include the sale at retail of that property in the regular course of business."

Section 320.13, F. S., provides that series "M" or dealers' demonstration motor vehicle tags "shall be valid for use on motor vehicles owned by the registered dealer to whom such tags were issued *while being operated in connection with such dealer's business*; but shall not be valid for use for hire. (Emphasis supplied.) Section 320.08(10), F. S., refers to said series "M" tags as "dealers demonstration tags." Chapter 10182, 1925, provided for "series 'M.' Dealers demonstration tags (for demonstration purposes only) each tag \$13.50." Demonstration of motor vehicles for purposes of sale to customers appears to be included in said §320.13, Florida Statutes. We find nothing in §320.08(10), in §320.13, or otherwise in Ch. 320, F. S., exempting motor vehicles bearing or using series "M" or dealers' demonstration tags from taxation in general, or from the sales and use taxing statutes imposed by Ch. 212, F. S.

You advise us that the following uses of a motor vehicle bearing a series "M" or dealers' demonstration motor vehicle tag are permitted uses: (1) Vehicles used for demonstration purposes; (2) Vehicles operated in connection with the dealer's business; (3) Vehicles in transit to and from a dealer's place of business; (4) Vehicles temporarily loaned, without compensation, to a customer by a dealer while the customer's vehicle is being repaired by the dealer; and (5) Vehicles used by a dealer for hauling equipment or materials, used in connection with his business, or making service calls. We find nothing in the Florida Statutes, or elsewhere in the laws of Florida, exempting motor vehicle dealers, or their vehicles bearing series "M" or dealers' demonstration motor vehicle tags, from the sales and use tax statutes, including §212.08, F. S., which sets out the exemptions from the Florida sales and use tax statutes. Vehicles used by a motor vehicle dealer in connection with the

operation of his business are not exempt from the said sales and use tax statutes. We did not discuss the question of the application of the sales and use tax statutes to the vehicles mentioned in our opinion of Oct. 31, 1957, 057-338, and the said opinion should not be construed as in any way applying to the application of the said sales and use tax statutes.

The vehicles put to use by a motor vehicle dealer in connection with his business, including those bearing series "M" or dealer's demonstration tags, are subject to the operation of Ch. 212, F. S. Motor vehicles used by a motor vehicle dealer for general demonstration purposes, after the expiration of the motor vehicle's model year, although bearing or entitled to a series "M" or dealer's demonstration tag, are not exempt from the operation of Ch. 212, F. S., (the sales and use tax statute) because it would appear that such motor vehicle held by the motor vehicle dealer and used for demonstration purposes after the expiration of its model year should be deemed used by such dealer in connection with his business and not as demonstrator as contemplated by law. Cars held by a motor vehicle dealer as inventory for sale and not used by the dealer in the operation of his business are exempt from the sales and use tax statute because such cars have not been sold or put to a taxable use.

The above stated question is answered in the negative, subject to the above and foregoing discussion of the same.

062-103—August 8, 1962

INSURANCE

ISSUANCE OF NONRESIDENT INSURANCE AGENT'S LICENSE TO RESIDENT OF PUERTO RICO— §§624.08, 626.0114, 626.0116, F. S.

To: *J. Edwin Larson, State Insurance Commissioner, Tallahassee*
QUESTION:

May a nonresident agent's license be issued to an insurance agent who is a resident of Puerto Rico?

Section 624.08, F. S. provides:

When used in context signifying a jurisdiction other than the state of Florida, "state" means any state, district, territory, or commonwealth of the U. S. and the Panama canal zone.

Puerto Rico is an organized "territory" of the U. S., though not yet incorporated into the Union, and it is not a "state" within the prohibition of the commerce clause. U.S.C.A. Const. Art. 1, §8, cl. 3; *Sancho v. Bacardi Corp. of America*, C.C.A. Puerto Rico 1940, 109 F. 2d 57, reversed on other grounds 61 S. Ct. 219, 311 U.S. 150, 85 L. Ed. 98.

When congress uses the term "territory" in a statute, such may be meant to be synonymous only with "place" or "area" and not necessarily to indicate that congress had in mind the niceties of language of a political scientist, who might say that Puerto Rico under its commonwealth status had ceased to be an unincorporated "territory" of the U. S. *Moreno Rios v. U. S.*, C.A. Puerto Rico, 1958, 256 F. 2d 68.

Puerto Rico, both before and after adoption and approval of its constitution, was a territory of the U. S. within the meaning of §1332 of title 28. *Detres v. Lions Bldg. Corp.*, C.A. Ill. 1956, 234 F. 2d 596.

Pursuant to §9.260, the insurance code of Puerto Rico, and subject to the limitations appearing in §§9.270 and 9.280 thereof, insurance agents resident of Florida may be issued a Puerto Rican nonresident agent's license.

I am of the opinion that pursuant to §626.0114 (1), F. S., and subject to such limitation as may be imposed by retaliatory provisions appearing in §626.0116, a Florida nonresident agent's license may be issued to an insurance agent resident of Puerto Rico.

062-104—August 8, 1962

**STATE OFFICERS AND EMPLOYEES
AUTHORIZATION FOR PAYROLL DEDUCTIONS FROM
SALARIES OF STATE EMPLOYEES—§112.171, F. S.**

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

When and under what circumstances may payroll deductions be made from the salary or other compensation of state employees?

This question relates specifically to deductions from the salaries or other compensation, payable by the state or its officers or agents, to state employees who may be members of the American federation of state, county and municipal employees, and indirectly to such deductions for other purposes. Doubtless, there will be additional expenses and costs incurred by the state or its officers or agents in processing and maintaining necessary books and records when such deductions are made and paid over to the party to whom payable. Likewise there will be benefits accruing to the organization to which such deducted funds will be payable, unless such organization bears such additional expenses. From such deductions there would appear to be benefits accruing to a private organization instead of to the state or one or more of its officers or agents.

In AGO 059-164, of Aug. 20, 1955, (1959-1960 AGO 241), this office held that labor unions, which under their constitution assert the right to strike, may not organize and solicit membership of public employees of the state or of any county or municipality thereof. Section 839.221, F. S., provides that "no person shall accept or hold any office, commission or employment in the service of the state, county or any municipality, who . . . participates in any strike or asserts the right to strike against the state, county or municipality. . . ." In those cases where a labor or other union asserts a right to strike against the state or its counties or municipalities, its members may not hold office or employment with the state or any of its counties or municipalities. No payroll deductions may be made where the officer or employee, from whose salary or other compensation such deductions are to be made, is a member of a union which asserts the right to strike against the public employing authority.

Section 112.171, F. S., provides that

the state or any of its department, agencies, bureaus, commissions and officers . . . (may) *in their sole discretion* make deductions from the salary or wages of any employee or employees in such amounts as shall be authorized and requested by such employee or employees and for such purpose as shall be authorized and requested by such employee or employees and shall pay the sums so deducted as di-

rected by such employee or employees. . . . (Emphasis supplied.)

This section makes it discretionary with the employing state department, agency, bureau, commission or officer whether such deductions will or will not be made, not at the discretion of the employees or any of them. This section should be construed as not permitting such deductions where the union or other agency to whom such payroll deductions are to be paid asserts a right to strike against the state or its employing officers or agencies.

We have examined a copy of the constitution of the American federation of state, county and municipal employees, and find in §2, Art. II, thereof the provision that "the attainment of the objective of this federation is to be accomplished through the employment of the following methods: . . . (specified methods not including strikes) . . . f. Exercise of other lawful means."

Payroll deductions may be made from the salaries or other compensation of state employees, under §112.171, F. S., and paid over as provided by said section, entirely at the discretion of the employing authority. Without the consent of the employing authority no such deductions may be made. Where a labor or similar union is involved and deductions are to be made for the use and benefit of such union, there must be proof submitted to the said employing agency, to be submitted to the state comptroller, a certificate by said union, made by its president or other suitable authority, that neither its constitution, by-laws or other authority provide for any enforcement by a strike against the state or any of its officers or agencies, and that no strike will be used for such enforcement.

The foregoing considered if you are satisfied from a showing made as outlined above that a union applying for salary deductions does not assert the right to strike, then you would be free to exercise your discretion to either give or refuse your consent to the deduction.

062-105—August 8, 1962

**DISPOSITION OF UNCLAIMED MONEY
FUNDS ON DEPOSIT IN STATE TREASURY UNDER
§69.16, F. S.; CH. 61-10, LAWS OF FLORIDA
(CH. 717, F. S.)—§731.28, F. S.; §18,
D. R., §16, ART. III, STATE CONST.**

To: *Ray E. Green, State Comptroller, Tallahassee*

STATEMENT OF FACT:

One Leopold Schoellhorn died intestate in Pinellas county sometime prior to Dec. 2, 1957, when an order was made and entered by the probate judge of said county for the distribution of the assets of the said estate to the persons entitled thereto. Among the heirs of said Leopold Schoellhorn were his children Auguste and Julius Schoellhorn, residents of a country referred to as one of the "unfriendly countries," evidently referring to the union of soviet socialist republics and her satellites as the unfriendly countries. It also appears that said Julius Schoellhorn is now deceased and that one Maria Elena Barbara Schoellhorn Gallasch is his sole heir and also a resident of one of the "unfriendly countries." The interests of Auguste and Julius Schoellhorn appear to

have been an undivided 2/36 interest each, or a total of 4/36 of the said estate. Evidently on the ground that the said Auguste and Julius Schoellhorn were residents of an unfriendly country, the probate court directed that the said funds be deposited in the state treasury under and pursuant to §69.16, F. S.

QUESTIONS:

1. Was §69.16, F. S., 1959, repealed in its entirety by §30, Ch. 61-10, and if not to what extent was it repealed?

2. What disposition should be made as to a claim by the owner of property deposited under §69.16, F. S., when such claimant is a citizen and resident of some so-called unfriendly country?

Section 69.16, F. S., provided that

in all cases where there are unclaimed funds in the hands of a receiver or trustee or legal representative of a person or decedent . . . which funds cannot be distributed or paid to the lawful owner by reason of inability to find the owner or claimant or because no lawful owner or claimant is known to exist, such fiduciary shall deposit the same with the clerk of the circuit court . . . and the clerk shall deposit said funds in the registry of the court.

After complying with the statutes the clerk transmits the funds, so deposited with him and by him deposited in the registry of the court, to the state treasury, to be credited to the account of the permanent school fund. Persons entitled to the said funds may proceed as provided in §69.16(3), F. S., to recover same. This section appears to have been omitted from the 1961 Florida Statutes, evidently on the theory that said section was repealed by §30, Ch. 61-10.

An examination of Ch. 61-10 (Ch. 717, F. S.) reveals that its purpose was to reach property that has remained unclaimed for a period of 15 or more years. Unclaimed funds, and property within the purview of said act, are not subject to be taken thereunder until they have remained unclaimed or abandoned for a period of 15 or more years. The unclaimed funds in the hands of receivers, trustees, etc., mentioned in §69.16, F. S., 1959, do not pass into the purview of Ch. 61-10 (Ch. 717, F. S.) unless and until they have remained unclaimed or abandoned for a period of 15 years. This leads us to the conclusion that §69.16, F. S., 1959, was not repealed by Ch. 61-10, except where the unclaimed funds therein mentioned have remained unclaimed or abandoned for 15 years or more. This being true, the unclaimed interests of Auguste and Julius Schoellhorn, from the estate of Leopold Schoellhorn, are still within the purview of and under §69.16, F. S., and will remain so until duly claimed by the person entitled to or until they have remained unclaimed for a period of 15 years.

Section 30 of Ch. 61-10 provides in part that "the following sections of the Florida Statutes are hereby repealed: Sections 69.07, 69.16, and 14.07-14.13 . . ." The title of said Ch. 61-10 is "An Act relating to and defining abandoned property, providing methods for same to be taken into custody by the state, for its recovery by the rightful owner, and for relieving the holder of liability for such property; providing an administrator; and providing an ef-

fective date." No reference is made in the above quoted title as to the repeal of any specific statute. Section 16, Art. III, State Const., provides that "each law enacted in the legislature shall embrace but one subject and matter properly connected therewith, which subject shall be briefly expressed in the title. . . ." The above quoted title to Ch. 61-10 gives no notice of an intention to repeal §69.16 in its entirety. The court in *Hysler v. State*, 132 Fla. 200, 181 So. 350, held that §16, Art. III, State Const., was not violated where the repealing clause repealed only acts in conflict. By inference before an act may repeal statutes not in conflict, some reference to such statutes should be made in the title. We are, therefore, of the opinion that said §30 of Ch. 61-10 should be construed as repealing the sections therein mentioned only to the extent that they may be in conflict with the provisions of said Ch. 61-10.

Section 18 of the Declaration of Rights, State Const., provides that foreigners who are eligible to become citizens of the United States, under the provisions of the laws and treaties of the United States, shall have the same rights as to the ownership, inheritance and disposition of property in the state as citizens of the state, but the legislature shall have power to limit, regulate or prohibit the ownership, inheritance, disposition, possession and enjoyment of real estate in the state of Florida by foreigners who are not eligible to become citizens of the United States under the provisions of the laws and treaties of the United States.

Section 731.28, F. S., provides that

an alien may devise, bequeath, inherit and transmit inheritance in real and personal property as if he were a citizen of the United States; and in making title by descent it shall be no bar to a party that the intestate or any ancestor through whom he derives his descent from the intestate is or has been an alien.

We find nothing in the Florida constitution and statutes providing a different rule when the person entitled to the inheritance is a resident of a so-called unfriendly country. The above constitutional and statutory provisions are sufficient to extend to all aliens, with the possible exception of an alien enemy.

AS TO QUESTION 1:

Section 69.16, F. S., was not repealed in its entirety by §30, Ch. 61-10, but only to the extent said Ch. 61-10 conflicts with said §69.16, F. S. Only property and funds which have been abandoned or unclaimed for a period of 15 years or more are within the purview of said Ch. 61-10, also described as Ch. 717, F. S.

AS TO QUESTION 2:

Section 69.16, F. S., not having been repealed in its entirety, appears to govern the disposition of funds deposited under the provision thereof for any period of less than 15 years. However, after funds have remained on deposit under said §69.16 for more than 15 years such funds should be transferred and deposited as provided in said Ch. 61-10.

As to the claim represented by the file submitted with your inquiry, we are of the opinion that although §69.16 no longer appears in the 1961 Florida Statutes, the provisions of said section would be controlling as to the return of these funds to a particular claimant thereof. It is therefore suggested that the claimant file a proper petition with the court having jurisdiction of this matter

to the end of securing the proper court order as required by §69.16 (3), F. S., 1959. It is suggested that in that proceeding all questions as to the right of a citizen resident of a so-called unfriendly country, to the funds in question, be presented to the court. It may well be some federal prohibition exists in this area and this question also should be determined in that court proceeding.

062-106—August 9, 1962

INSURANCE

AUTOMOBILE LIABILITY INSURANCE—REJECTION OF UNINSURED MOTORIST COVERAGE ON POLICY RENEWAL—§627.0851(1), F. S.

To: J. Edwin Larson, State Insurance Commissioner, Tallahassee
QUESTION:

Upon each renewal of an automobile liability insurance policy is it necessary to secure the named insured's rejection of uninsured motorist coverage?

The issuing or delivering of automobile liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicle registered or principally garaged in this state is prohibited unless such coverage includes "uninsured motorist" coverage. Such prohibition is subject to the proviso that it need not be afforded where the named insured rejects the coverage (§627.0851 (1), F. S.).

You advise that it is the custom of many companies to issue a new policy each year and that they have inquired as to the necessity of securing the named insured's rejection in connection with each renewal policy issued. Because said section prohibits the issuing of automobile liability insurance without uninsured motorist coverage unless such coverage is specifically waived by the named insured, I am of the opinion that the insured's rejection of the uninsured motorist coverage required by §627.0851 (1), F. S., should be obtained in connection with each renewal policy issued. See Appleman's Insurance Law and Practice, Vol. 13, §7641, et seq.; and 29 Am. Jur., Insurance, §258.

062-107—August 13, 1962

COMPENSATION OF STATE OFFICERS AND EMPLOYEES ASSISTANT STATE ATTORNEYS—§§27.222, 27.223, 27.231, F. S.; CHS. 28820, 30058, LAWS OF FLORIDA, 1953 AND 1955, RESPECTIVELY, CH. 57-735, LAWS OF FLORIDA

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

What salary is payable from state funds to the several assistant state attorneys under present existing statutes and laws?

From the adoption of §11, Ch. 19280, 1939, until the repeal of §216.171(5), F. S., by §2, Ch. 61-401, provision was made in the statutes whereby the statutory salaries of state officers and employees were suspended during the biennium and the appropriated amount, as evidenced by the biennial appropriations acts, substituted for the statutory salaries during the life of the appropriations act. Section 216.171(5), above mentioned, provided that . . . where a sum is mentioned in the general appro-

priations act for the salary of a state officer or employee such amount shall control over prior statutes fixing such salary, except those enacted at the same session of the legislature.

Such legislation was sustained by the Florida supreme court in *State ex rel Williams v. Lee*, 140 Fla. 380, 191 So. 697, and *State ex rel Knott v. Lee*, 144 Fla. 164, 197 So. 681, wherein the amount fixed by the legislative budget of the biennial appropriations act was held to control over the applicable salary statute. Section 216.171 (5) was repealed as of June 30, 1962. With the repeal of said §216.171 (5), we may no longer look to the appropriated amount to determine the salary of state officers and employees, but must look to the salary statutes, acts and laws. Our application of said §216.171 in our letter of March 28, 1961, was terminated by the repeal of said section effective June 30, 1961, so that the said letter is without further application.

Our examination of Ch. 27, F. S., reveals three sections thereof which seem to relate to the salaries of the assistant state attorneys. Sections 27.222 and 27.223, F. S., appear to cover the same field so that said §27.222, derived from Ch. 29891, 1955, appears to have been replaced and superseded by said §27.223, derived from Ch. 57-376. It is our view that said §27.222 was replaced by said §27.223. Under said §27.223

... the salary of each assistant state attorney for each judicial circuit shall be *six thousand five hundred dollars per year* . . . ; provided, however, that nothing contained in this section shall be construed to reduce the salary of any . . . assistant state attorney nor to affect, amend or repeal any law of this state not particularly mentioned. . . . (Emphasis supplied).

The proviso in said §27.223, F. S., preserves existing salaries of assistant state attorneys in excess of \$6,500 per annum.

Section 27.231, F. S., fixes a salary of \$7,500 per annum in those judicial circuits of the state including a county with a population of more than 260,000 according to the last preceding state census. Under §5, Art. VII, State Const., the 1960 federal census, which is made a state census by said section of the Florida constitution, is the last preceding state census for the operation of said §27.231. The provisions in said §27.231, fixing the salaries of certain assistant state attorneys, appear to have been replaced by the salary provided in §27.223. It therefore appears that the salaries of assistant state attorneys in judicial circuits generally are fixed at \$6,500 per year; however, in those judicial circuits having a county therein with a population of more than 260,000 the salary is \$7,500. The 4th, 6th, 9th, 11th, 13th and 15th judicial circuits seem to embrace a county with a population in excess of 260,000.

Chapter 28820, 1953, as amended by Ch. 30058, 1955, relating to those judicial circuits with 10 or more circuit judges, and a county with a population of more than 450,000, fixed the salaries of the assistant state attorneys therein mentioned at \$8,500 for those assistants described in §2 of said 1953 act, and \$7,500 for those described in §3 of said act, each as amended. At the time of the enactments of said 1953 and 1955 acts, only Dade county was within the purview of said acts. Under the 1960 census only Dade and Duval counties have populations in excess of 450,000. The judicial circuits embracing both Dade and Duval counties have more than 10 circuit judges.

Chapter 57-735 makes provision for the assistant state attorneys in judicial circuits composed of a single county with a population in excess of 450,000. This act seems to supersede Chs. 28820 and 30058, above mentioned, as to Dade county and the 11th judicial circuit. It is our thought that this act had the effect of repealing Ch. 30057, 1955, relating to assistant state attorneys in judicial circuits embracing a county with a population of more than 450,000 and 12 or more circuit judges, insofar as Dade county and the 11th judicial circuit are concerned. Chapter 28459, 1953, which fixes the salaries of assistant state attorneys in judicial circuits of three or more counties, one of which has a population of 290,000 or more, which appears to embrace only the 4th judicial circuit, appears to have been replaced by Chs. 28820 and 30058, 1953 and 1955.

From the above and foregoing it seems that Chs. 28820 and 30058, 1953 and 1955, regulate the compensation of assistant state attorneys for the 4th judicial circuit, and Ch. 57-735 the compensation of assistant state attorneys for the 11th judicial circuit, insofar as state payments are concerned. Section 27.223, F. S., appears to regulate the salaries of assistant state attorneys except in said 4th and 11th judicial circuits.

062-108—August 13, 1962

TAXATION

TAXATION OF LEASEHOLD INTERESTS—LEASES FROM SANTA ROSA ISLAND AUTHORITY—CHS. 24500, 26422, LAWS OF FLORIDA, 1947 AND 1949, RESPECTIVELY; §192.62, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where a lessee from the Santa Rosa island authority and the board of county commissioners of Escambia county, constructs a fishing pier extending into navigable waters from Santa Rosa island, is said pier subject to ad valorem taxation?

Chapter 24500, 1947, as amended by Ch. 26422, 1949, established, or provided for the establishment of, the Santa Rosa island authority, and authorized the administration of said island for public purposes. The said island authority seems to be in law an agency of the board of county commissioners for Escambia county charged with the administration of the island and its facilities for public purposes. This authority is authorized from time to time, to lease the island in whole or in part or parts to such person or persons and for such purposes it shall deem to be in the public interest, and upon such terms and conditions and for such periods of time as it shall fix, but the whole of the island shall always be subject to regulation by the county commissioners, whether leased or not leased.

The board of county commissioners may authorize the establishment and operation of "board walks, sea walls, breakwaters, causeways, wharves, docks, piers, yacht basins," etc.

Although the construction and operation of *wharves, docks, and piers* are authorized by the statutes, there is no mention of such construction and operation of *fishing piers*. We find nothing in

Chs. 24500 and 26422, 1947 and 1949, vesting title to the submerged land around or adjacent to Santa Rosa island in either the board of county commissioners or the island authority, or authorizing the leasing of such submerged lands by either the said county commissioners or island authority. However, if the authority above mentioned for the construction and operation of wharves, docks, and piers, may be construed as including fishing piers, then such piers would appear to be within §2, Ch. 25810, 1949, declaring that

all of the real and personal property owned, controlled or used by Escambia county, or Santa Rosa island authority, under or by virtue of said Ch. 24500, 1947, or for any of the purposes thereof, including real and personal property rented or leased to others by said county or said Santa Rosa island authority, shall be exempt from state, county, municipal and all other ad valorem taxes of every kind.

In *Park-N-Shop, Inc. v. Sparkman*, Fla. 99 So. 2d 571, texts 573 and 574, the court remarked that, absent statutory provisions, county property is "immune from taxation." Under *Park-N-Shop, Inc. v. Sparkman*, supra, as well as under *Patrick Gardens v. Nash*, Fla. 100 So. 2d 626, and *Ill. Grain Corp. v. Schleman*, Fla. App. 114 So. 2d 307, leasehold interests, in the absence of statute providing otherwise, are not subject to taxation.

Since the disposition of the above mentioned supreme court and district court of appeal cases, the 1961 legislature enacted Ch. 61-266, now appearing as §192.62, F. S. Under this section of the statutes leasehold interests in real and personal property exempt from taxation because of governmental ownership, when used in connection with a profit-making venture, may be subjected to county and municipal ad valorem taxation, with certain exceptions. This section is expressly inapplicable to property located on Santa Rosa island and owned by the county "or is controlled by an agency thereof created by statute and is used for public purposes authorized by law." This reference is clearly to the properties embraced in Ch. 24500, as amended by Ch. 26422, 1947 and 1949. Although it might be argued that the fishing pier in question is not upon lands belonging to either Escambia county or the Santa Rosa island authority, we presume that said pier has been constructed by either the said county or authority and rented by the county or authority, or both, and rents collected therefor. The persons renting said pier from the county or authority, or both, may not deny the title of the agency from which rented. Under §192.62, F. S., real and personal property, exempt or immune from taxation by reason of public ownership, used, occupied, controlled or possessed by a lessee, licensee, or other right of possession or use, is subject to ad valorem taxation, unless within the purview of one or more of the exceptions mentioned in said §192.62(2), F. S., which includes use by "a corporation performing *services of public nature* for the operation of its public utilities facilities thereon," or when the property in question is on Santa Rosa island and is owned by Escambia county, Santa Rosa county, or Okaloosa county, or is controlled by an agency thereof created by statutes, *and is used for public purposes authorized by law*.

The property in question is a fishing pier, which we must presume is being used for fishing purposes by the public upon the payment of a fee. In *Peavy-Wilson Lumber Co. v. Brevard County*, 159 Fla. 311, 31 So. 2d 483, text 486, the court remarked that to take one man's property, against his will at public expense,

and make it available to a group who may have the leisure and inclination to hunt and fish constitutes a private rather than a public use. . . . Hunting and fishing are not county purposes and do not bear any relation to public health, morals or safety.

In *Osceola County v. Triple E. Devel. Co.*, Fla., 90 So. 2d 600, text 603, the county brought eminent domain proceedings for the purpose of taking two non-navigable lakes for the purpose of making them fishing ponds, lakes or holes for the benefit of the public. The court remarked that "such an appropriation is not for a public purpose and will not be permitted by condemnation." The statement is made in 29 C. J. S. 860, §71, that "the right to fish in an inland lake is not such a right as can be taken under the power of eminent domain." See also annotation in 172 A. L. R. 17. There are some contrary cases, some of which may depend on constitutional or statutory provisions. These authorities indicate that a fishing pier is not used for public purposes, but for private purposes, and that the services performed by a fishing pier should not be classified as public services or services of a public nature. We have been advised that the fishing pier in question was constructed with private funds and not public funds.

From the above and foregoing we conclude that the leasehold interest in the fishing pier is subject to taxation under §192.62, F. S., in the manner therein provided.

062-109—August 14, 1962

ELECTIONS

AUTHORITY TO PLACE CONDITIONAL REFERENDUM ON BALLOT PRIOR TO RATIFICATION OF PRIMARY FOR THE ELECTION—§2, COMMITTEE SUBSTITUTE FOR HOUSE JOINT RESOLUTION 1443, 1961 REGULAR SESSION; §10A, ART. XII, STATE CONST.

To: *Thomas D. Bailey, Superintendent of Public Instruction, Tallahassee*

QUESTION:

May the board of county commissioners in the appropriate counties upon request of the board of public instruction, place upon the ballot in the forthcoming November election the referendum provided in §2 of the committee substitute for house joint resolution 1443 relating to the approval or rejection of the system of appointing school superintendents?

The committee substitute for house joint resolution 1443 provides:

Be it resolved by the legislature of the state of Florida: That article XII of the Florida constitution be amended as set forth below and that said resolution be submitted to the electors of Florida for ratification or rejection at the general election to be held in November, 1962.
Section———. *County superintendents of public instruction; appointment in certain counties.*—

(1) The county superintendent of public instruction shall be appointed by the county board of public instruction in the counties of Alachua, Charlotte, Collier, Manatee, Orange, Lee, Monroe, Leon, Indian River, St. Lucie, Broward,

Baker, Brevard, Hendry and Hillsborough wherein the proposition is affirmed by a majority vote of the qualified electors of any such county making the office of county superintendent of public instruction appointive.

(2) The board of public instruction of the county may request an election, which may be a special election or may be on the ballot of any regular primary or general election to be designated by the board of public instruction, and upon such timely request the board of county commissioners of such county will call such special election or cause to be placed on the ballot at such other election the proposition whether subsection (1) shall be effective in such county.

It can be seen that the proposed amendment to Art. XII, quoted above, provides in §1 for the appointment of school superintendents in 15 named counties conditioned upon the approval of the electors of each of the counties involved voting in a referendum election provided in §2 of the proposed amendment.

The question now arises as to whether the referendum provided in §2 of the proposal may be put on the ballot in the applicable counties at the same time the proposal for adoption of the amendment is put on the ballot for approval by the electors from the state at large.

In this instance the proposal for constitutional revision provides for two separate elections. While there is no provision which would prohibit holding two separate elections on the same date the general rule is that the county commissioners cannot hold an election without proper authority or a legal appropriation of funds to conduct said election. See AGO 053-247, p. 69 of the 1953-54 biennial report of the attorney general.

In construing proposals such as this, legislative intent is always a question to be resolved and a pole star by which we must be guided in reaching a conclusion (*Ervin v. Peninsular Tel Co., Fla.*, 53 So. 2d. 647, *Smith v. Ryan, Fla.*, 39 So. 2d. 281, and *Florida State Racing Com. v. McLaughlin, Fla.*, 102 So. 2d. 574).

It seems significant to note the language used by the legislature in making a similar amendment to Art. XII, §10A of the state constitution. Like the proposal under consideration here the amendment to Art. XII, §10A, required two elections to fully implement the constitutional amendment. The significant distinction between that proposal and the one under consideration here is the following language found in §10A.

(2) To submit the proposition contained in subsection (1) above to the electors a special election shall be called by the county commissioners of any county upon the request of the county board of public instruction therein, *which election may be held at the same time as the next general election and the result thereof shall determine whether subsection (1) shall be effective in such county.* (Emphasis supplied.)

The above quoted language specifically authorized the two elections to be held at the same time whereas no such language is found in the current proposal to amend the constitution.

In analyzing the intent of the legislature adopting the committee substitute to house joint resolution 1443 it would seem that had the legislature intended for both elections to be held simultaneously at the forthcoming general election they would have so said

as they did in 1955 when proposing the amendment to Art. XII, §10A.

This difference in expression leads the writer to the conclusion that the 1961 legislature did not intend for the current proposal to be voted on in the 15 applicable and appropriate counties until some time subsequent to the ratification of the proposal by the electorate at large at the forthcoming state wide general election. Had the legislature intended for both elections to be held at the same time it would have used language identical or at least similar to that found in the 1955 proposal to amend Art. XII, §10A. The language used in the 1961 proposal gives every indication that the legislature intended for the holding of the special referendums in the 15 named counties to be conditioned upon the adoption and ratification of the proposed constitutional amendment.

Other factors also lead to the conclusion that the county commissioners would not be justified in placing the special referendum item on the ballot in the 15 named counties this November. First there is always the possibility that the proposed constitutional amendment might be rejected and thus no life ever breathed into §2 of the proposal wherein the 15 local referendum elections are authorized. Secondly, even if the proposal is ratified it does not appear that life will be breathed into §2 until the last vote is cast on election day. Thus it would appear that there is not now and cannot be until the close of the polls on election day any clear legal duty which would subject the boards of county commissioners in the 15 affected counties to a successful action in mandamus should they refuse to put the referendum election provided in §2 of the proposal on the November ballot along with the primary question relating to the ratification of the proposed amendment. This being the case it would appear that the county commissioners of the 15 counties named in the house joint resolution discussed herein do not have the authority to place the referendum election provided in §2 of the proposal on the forthcoming November ballot.

Accordingly your question as set out above is answered in the negative.

062-110—August 17, 1962

REGULATION OF VOCATIONS AND PROFESSIONS

BARBERS' SANITARY COMMISSION—TRANSFERABILITY OF LICENSE TO OPERATE SCHOOL OR COLLEGE OF BARBERING—§§476.07, 476.071, CH. 476, F. S.

To: *S. J. McMillan, Secretary, Florida Barbers' Sanitary Commission, Tallahassee*

QUESTION:

May a license to operate a school or college of barbering, duly issued by the barbers' sanitary commission of this state be transferred from the licensee to another?

According to the information which you have supplied to our office, the factual situation is substantially as follows. The license to operate a barber college, which college had been operated by the original licensee since approximately 1949, was purportedly transferred in 1962 to the purchaser of the fixtures and assets of said school. It seems that the original licensee died in the early part of 1962; and his widow subsequently conveyed the fixtures,

etc., including the license, to the said purchaser, who in turn moved said college to another part of the state.

Section 476.071(1), F. S., requires the issuance of a license to operate a school or college of barbering in this state. The barbers' sanitary commission is vested with the responsibility of approving and issuing such licenses. Section 476.071(1) provides in part as follows:

Schools or colleges of barbering.—

(1) No school or college of barbering shall be approved by the barbers' sanitary commission and no license shall be issued to operate or conduct any such school or college of barbering *unless and until it shall be demonstrated to the commission that the applicant is fully qualified to thoroughly educate and instruct students in all subjects necessary and required to fit them as competent barbers* (Emphasis supplied.)

In addition to the foregoing, an applicant must supply, under oath, such detailed information as the exact location of the school or college, a detailed drawing of the premises, including, of course, the full name of the applicant. Subsection (2) of said section sets forth certain requirements that must be met by the barbering school relating to competent and trained barber teachers.

Under §476.07, F. S., both the management and the faculty of a school or college of barbering must be duly registered barber teachers. The licensing of a school or college of barbering is, therefore, largely dependent upon the personal fitness of the applicant and both the management and teachers being duly qualified and registered as barber teachers.

. . . A license is in the nature of a special privilege, rather than a right common to all, and is often required as a condition precedent to the right to carry on business . . . 33 Am. Jur., Licenses, §2, p. 325.

. . . In the main, the distinction between a property tax and a license or privilege tax imposed for revenue is that the function of the property tax is to raise revenue . . . while the license or privilege tax, even also passed to raise revenue, is imposed upon the right to exercise a privilege . . . 33 Am. Jur., Licenses, §3, p. 326.

. . . While it (a license) has been regarded, for some purposes, as a valuable property right, strictly speaking, it is not property or a property-right, nor does it create a vested right . . . (Parentheses supplied). 53 C. J. S., Licenses, § 2, p. 449.

There appears to be a long line of cases from other jurisdictions standing for the proposition that a license generally is regarded as a special privilege of personal trust and confidence that cannot be assigned or transferred. (See *Hom Moon Jung v. Soo, et ux.*, 167 P. 2d 929; *John Barth Co. v. Brandy, et al.*, 161 N. W. 766; *In re Buck's Estate*, 39 A. 821; *In re Grimm's Estate*, 37 A. 403; *State ex rel. Gordon Memorial Hosp., Inc. v. West Virginia State Board of Examiners for Registered Nurses, et al.*, 66 S. E. 2d 1; *In re Blumenthal*, 18 A. 395; *State v. Lydick*, 9 N. W. 560; *Shannon v. Esbeco Dist. Corp.*, 120 S. W. 2d 745; *State v. Bayne*, 75 N. W. 403; see also 53 C. J. S. Licenses, §45; 33 Am. Jur., Licenses, §66.

In the light of the above and foregoing, it appears that although an owner of a school or college of barbering might sell and

transfer his property interest in the school and its equipment to another, he may not sell and transfer his license or right to operate the school as the same is merely and only a personal right granted him by the barbers' sanitary commission.

In addition to the foregoing, the instant inquiry raises some question as to whether a transfer can be effectuated under the existing provisions of Ch. 476, F. S. It is stated in 1 Am. Jur. 2d, Adm. Law, §70, p. 866:

Administrative agencies are creatures of statute and their power is dependent upon statutes, *so that they must find within the statute warrant for the exercise of any authority which they claim.* They have no general or common-law powers but only such as have been conferred upon them by law expressly or by implication. (Emphasis supplied.)

See also 73 C. J. S., Pub. Adm. Bodies, §48, p. 367, et seq.; Bd. of County Com. of Dade County v. State, 111 So. 2d 476, 479.

An examination of the provisions of Ch. 476, F. S., fails to indicate the existence of any procedure or any authority to effectuate a transfer of a license to operate a barber college. In Edgerton v. International Co., 89 So. 2d 488, 490, it is stated:

... If there is a reasonable doubt as to the lawful existence of a particular power that is being exercised, the further exercise of the power should be arrested. *State v. Atlantic Coast Line R. Co.*, 56 Fla. 617, 47 So. 969, 32 L. R. A., N. S., 639.

Since there is no authority present in the law to transfer such license and since there is reasonable doubt as to the lawful existence of such power, it would seem to follow that the commission would not be empowered to effectuate a transfer.

Most of the cases previously cited above concerned the transferability of a license to operate a liquor establishment. Several of the decisions conditioned the transferability of such licenses upon the consent of the licensing authorities. However, an examination of such cases reveals that the consent of the licensing authority was specifically required in the particular statute. Statements made by the court in three of the aforementioned cases directly relate to the authority to transfer and the necessity that such authority be found in the statute creating the regulating body.

In *State v. Lydick*, supra, the supreme court of Nebraska, in commenting upon the transferability of a liquor license by the city council, stated:

The act of March 1, 1879, above referred to, is the charter of the city of Falls City, as well as of all other cities of the second class and villages in this state; *and all official acts of the mayor and council of said city, not expressed in, or fairly intended by, the provisions of said act, or some other general law of the state applicable thereto, are ultra vires and void* . . . (Emphasis supplied.)

In *State v. Bayne*, supra, the supreme court of Wisconsin, dealing with a situation similar to that in the *Lydick* case, supra, stated:

... True, the town board sanctioned such transfer, *but, as indicated in some of the cases cited, the statute gave no authority for such transfer, and without such authority no transfer could be made.* We are clearly of the opinion that the transfer of the license, and the action of the town board

thereon, were without authority of law and void
(Emphasis supplied.)

In *In re Blumenthal*, supra, the supreme court of Pennsylvania, again dealing with a situation similar to that in the aforementioned cases, stated:

. . . It follows, therefore, that a license cannot be transferred, unless expressly authorized by act of assembly and in the mode therein prescribed (Emphasis supplied.)

Aside from the question of the power to transfer, it is interesting to note from the factual circumstances presented in this inquiry that the license to operate the barber school was purportedly transferred after the death of the initial licensee.

In 53 C. J. S., Licenses, §43, p. 646, it is stated as follows:

. . . A license to pursue a given occupation or business is terminated by the holder's death. (Emphasis supplied.)

Again referring to the analogous situation dealing with the issuance of a license to operate a liquor establishment, the following cases support the aforementioned-quoted proposition: In *re Ryan's Estate*, 99 A. 2d 562; In *re Grimm's Estate*, supra; *State v. Steiner*, 151 N. W. 256; In *re Buck's Estate*, supra; *John Barth Co. v. Brandy*, et al., supra; *State v. Bayne*, supra.

Quoting from *State v. Steiner*, the supreme court of Wisconsin stated as follows:

The instant case also presents a difficult question of construction. On the one hand, it does not seem very reasonable that the legislature, while endeavoring to fix a maximum of liquor licenses for the municipality, and at the same time protecting the property of men who had invested in saloon business or buildings, intended to withdraw the latter protection from the widow and children of such men. Nevertheless, it is well-established law that, in the absence of a statute providing otherwise, a license of this kind, although for a fixed term, comes to an end with the life of the licensee. *People v. Sykes*, 96 Mich. 452, 56 N. W. 12; *U. S. v. Overton*, 2 Cranch, C. C. 42, Fed. Cas. No. 15,979; *Woollen & Thornton on Law of Intoxicating Liquors*, §422, and cases cited; In *re Blumenthal*, 125 Pa. 412, 18 Atl. 395; *Black on Intoxicating Liquors*, §131. (Emphasis supplied.)

While it is true that the license to operate a barber college is, on its face, distinguishable from the license to operate a liquor establishment, yet because of the similarity in the purpose for which such laws were enacted and the conditions attached to the initial issuance; to wit, the enactment of regulations under the police power for the protection of the public and the importance of determining the personal qualifications and fitness of the applicant, it is reasonable to conclude that the aforementioned propositions of law would be applicable to the instant situation. It should be emphasized that we are concerned with the exercise of police power for the preservation of the public health, safety and welfare subject to the constitutional guarantees. The exercise of the police power necessarily curtails the free use and enjoyment of personal and property rights.

. . . All private rights are enjoyed by individuals as members of the public constituting organized society, and such rights are subject to the paramount right of the state to modify them to conserve the public welfare. Accordingly,

the possession and enjoyment of all rights are subject to the police power, and persons and property are subject to restraints and burdens necessary to secure the comfort, health, welfare, safety, and prosperity of the people (6 Fla. Jur., Const. Law, §191, p. 426).

The act in question has undoubtedly been promulgated for the protection of the public as well as the business regulated. It is important, therefore, that we bear in mind the purposes of such acts, construing them in light of public welfare. In *Robbins v. Webb's Cut Rate Drug Co.*, 16 So. 2d 121, it is stated:

The barbers' occupation is now regarded as one of the most respectable businesses in the country. Certainly its relation to the public is such that it may be regulated but public interest as well as the interest of those engaged in the business must direct the regulation. If the regulation trenches on this principle, it amounts to the unlawful invasion of one's right to pursue a lawful business. Regulations that rest on nothing more than caprice of an administrative board cannot be enforced

In summary, it is my opinion that a license to operate a barber school is personal to the particular operator and is not transferable or assignable; it is no more transferable than a license to practice barbering. Although a purchaser may acquire the property interest of a duly licensed operator of a school or college of barbering in and to said school or college, such acquisition does not carry with it the right to operate the said school or college unless and until the purchaser duly qualifies under the provisions of §476.071, F. S., as they exist at the time the new applicant files his application.

In addition to the foregoing proposition and the fact that such license would appear to terminate upon the licensee's death, the absence of statutory authority to transfer would raise a serious doubt as to the authority of the commission to effectuate such transfer.

Nothing in this opinion is intended to imply that the barbers' sanitary commission is without authority to issue a license to the purchaser of the property interest held by the widow of the original licensee of the barber college. Whether this purchaser would be qualified to be issued such license is a question that lies within the sound discretion of the commission duly exercised in accordance with the licensing provisions of Ch. 476, F. S.

Your question is, therefore, answered in the negative.

062-111—August 21, 1962

TAXATION

TAX SALE CERTIFICATES AND LIENS—TAX DEED SALE APPLICATIONS—LIMITATIONS—§§196.12, 95.01, 95.021, 95.11, 95.28, 193.51-193.64, 194.58, 697.01, 697.02, F. S.; §33, ART. III, STATE CONST.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. Should the clerks of the circuit courts cancel of record state and county tax sale certificates more than 20 years old?
2. Should such clerks recognize and include in applications for tax deed sales tax sale certificates more

than 20 years old as of the making of the application for tax deed sale?

3. Does §196.12, F. S., and said section as implemented by §95.021, F. S., apply to municipal tax sale certificates as well as to state and county tax sale certificates?

Section 196.12, F. S., provides that:

A period of twenty years is declared to be the life of any tax certificate issued against any lands in the state, *whether issued for state and county taxes or issued by a municipality for municipal taxes*, and held by any private holder, natural or corporate, partnership, trustee, estate of deceased person, or other person or persons under disability, or otherwise, *such period of twenty years to be reckoned from the date of the issuance of such tax certificate*; and when such certificate becomes twenty years old, reckoned from the date of its issuance, the same shall be deemed and held to be barred by this statute of limitation, and no action on such certificate shall be maintained by any such private holder in any court of this state, and no tax deed shall issue thereof . . . (Emphasis supplied.)

This section was derived from Ch. 19515, 1939, and clearly relates to those tax sale certificates issued under and pursuant to §§193.51-193.64, F. S., and similar certificates issued by municipal corporations. Where there is no statutory provision in their municipal charters or otherwise providing a different procedure, municipalities, under §§193.61 and 193.62, F. S., follow the same procedure as do county tax officials in enforcing delinquent ad valorem taxes of the county. Under some municipal legislative charters no delinquent tax sales are held and no tax sale certificates are issued by the municipality, but municipal ad valorem taxes and their liens are foreclosed pursuant to Ch. 173, F. S., or similar charter provisions. The application of said §196.12, F. S., to tax sale certificates issued and outstanding on the effective date of said statutes, that is June 12, 1939, becomes apparent, in the light of §33, Art. III, State Const., should there be outstanding such certificates at this time.

Section 33, Art. III, State Const., provides that "no statute shall be passed lessening the time within which a civil action may be commenced on any cause of action existing at the time of its passage." It may be noted that this constitutional provision relates to causes of action; unless tax sale certificates are "causes of action," they would not seem to be within the purview of said §33, Art. III, State Const. Prior to the adoption of Ch. 19515, 1939, now appearing as §196.12, F. S., there was no statute of limitation within which tax sale certificates might be enforced. The court, in *Lee v. Lang*, 140 Fla. 782, 192 So. 490, text 491, et seq., seems to have doubted that a warrant for the collection of a tax was an action or a cause of action under said §33, Art. III, State Const., and expressly held that until and unless there was an existing statute or limitation, said §33, Art. III, has no application. The placing of a limitation upon a cause of action having no fixed period for bringing an action is not a lessening of the time within which a civil action may be commenced. "The purpose of §33, Art. III, of the Florida constitution, was to prevent a subsequent statute from having a retrospective effect by reducing this period of limitation after the statute had already begun to run against a cause of

action." (Lee v. Lang, supra, So. text 493; Re Estate of Woods, 133 Fla. 730, 183 So. 10, text 13, 117 A. L. R. 1202). Section 196.12, F. S., appears to have been upheld in Campbell v. Horne, 147 Fla. 523, 3 So. 2d 125, against a contention that it was violative of §33, Art. III, State Const.

Section 95.021, F. S., provides that

The provisions of existing law, whether provided for in this chapter or any other chapter, whereby an action is barred if not commenced within twenty years, shall apply to any action by the state, or any of its agencies, or by any officer or persons on behalf of the state or any of its agencies, or by any county or municipal corporation of the state.

This provision of the statutes of the state fixes no limitation of 20 years on actions or proceedings by the state, its agencies, officers, counties or municipalities, but merely and only applies to the state, its officers, agencies, counties and municipalities, the 20 year statutes of limitation applicable to individuals, firms, corporations, etc. Only the 20 year statutes of limitation are made applicable to the state, its agencies, officers, counties and municipalities; limitations for any lesser period of time are not made applicable by said §95.021, F. S. Before a 20 year limitation may be applied under said §95.021, there must be in the first instance such a statute of limitation applicable to some person, firm or corporation, fixing a 20 year limitation. The limitations imposed by §196.12, F. S., on persons, firms and corporations, are made applicable to the state and its officers, agents, counties and municipalities, by and under said §95.021, F. S. Section 95.021 applies the 20 year statutes of limitation applicable to persons, firms and corporations, to the state and its officers, agents, counties and municipalities.

Section 194.58, F. S., insofar as here material, provides that After the expiration of twenty years from the date of issuance of any tax sale certificate issued against any lands in the state, whether issued for state taxes, state and county taxes, county taxes, or issued by a municipality for municipal taxes, and held by any private holder, natural or corporate, partnership, trustee, estate of deceased person, or other person or persons under disability, or otherwise, and no application for tax deed thereon, or other administrative or legal proceeding is pending involving said tax sale certificate, the several clerks of the circuit court of the state are authorized, empowered and directed to note the cancellation by this section of such 20 year old tax sale certificate upon any and all records thereof in the office of such clerk.

This section was derived from Ch. 23828, 1947, and should be read in the light of the preamble to said chapter.

The preamble to said Ch. 23828, 1947, is in words and figures as follows:

WHEREAS, under the provisions of chapter 19515, 1939, being §196.12, F. S., 1941, a period of 20 years from the date of issuance thereof is declared to be the life of any tax sale certificate issued against any lands in the state of Florida, whether issued for state, county or municipal taxes, and held by any private holder, natural or corporate, partnership, trustee, estate of deceased person, or other person or persons under disability, or otherwise,

and no action on such certificate may be maintained after such lapse of time and no tax deed may issue thereon, and WHEREAS, in the interest of the public, and of orderly efficient administration of the office of the clerk of the circuit court, provision should be made to note the cancellation or invalidity of such tax sale certificates upon the official records in the office of the clerk of the circuit court, . . .

It is clear from this preamble that said §194.58 was designed and intended to direct the cancellation of tax sale certificates barred by §196.12, F. S. This being true, both said sections should be construed in the light of the other said section. Unless the legislature intended §196.12 to be more in the nature of a nonclaim statute than an ordinary statute of limitation, there was little reason for the cancellation of the said tax sale certificates. Section 194.58 treats §196.12 as terminating the demand and lien of tax sale certificates more than 20 years of age; that is, as if it were a statute of nonclaim instead of a statute of limitations. If §196.12 had been intended as a pure statute of limitation, then §194.58 should not have been enacted. Section 194.58 treats ad valorem tax obligations, and the tax sale certificates evidencing them, as terminating at the end of the twentieth year after their issuance, and as having no validity thereafter.

The district court of appeal, in *Ware v. City of Miami, Fla. App.*, 132 So. 2d 446, held that, through the operation of §§95.021 and 95.28, et seq., F. S., a limitation of 20 years was imposed on the enforcement of municipal special assessment liens. In *Ideal Farms Drainage Dist. v. Certain Lands*, 154 Fla. 554, 19 So. 2d 234, the court on rehearing held that §95.11(3), had no application to drainage district special assessment, after having held said statute applicable. This holding on rehearing appears to have been based on §95.01, exempting certain governmental agencies from the operation of Ch. 95, F. S. Section 95.021 was enacted subsequent to the *Ideal Farms* drainage district case. Section 697.01, F. S., declares the instruments deemed mortgages under the laws of Florida, and §697.02 the nature of a mortgage; in the *Ideal Farms* drainage district case, the court appears to have compared an assessment for special benefits as being in the nature of a mortgage. In *Dalrymple v. Milwaukee*, 53 Wis. 178, 10 N. W. 141, text 144, and in *Pratt v. Milwaukee*, 93 Wis. 658, 68 N. W. 392, text 393, the Wisconsin court held that certificates issued to evidence non-payment of assessments for benefits for street or other improvements, were tax certificates. Notwithstanding the above *Ideal Farms* drainage district case, we are not, at the present time, prepared to say that assessments for special benefits and the liens thereof are mortgages under §95.021, F. S.

From the above and foregoing we are of the opinion that:

1. The clerks of the circuit courts should cancel of record outstanding state and county tax sale certificates, whether owned by the state or county, or some person, firm or corporation, where such tax sale certificates are or become 20 years of age, counting from the date of the issuance of such tax sale certificates.

2. Such clerk may not and should not recognize or include in applications for tax deed sales, and should reject in that connection, any tax sale certificates offered that are more than 20 years old as of the date of the making of the application. This rule ap-

plies even though such barred certificates be accompanied by a current certificate.

3. Section 196.12, F. S., and said section as implemented by §95.021, F. S., apply also to municipal tax sale certificates as well as to state and county tax sale certificates.

062-112—August 27, 1962

**FICTITIOUS NAME STATUTE
APPLICATION TO FIRMS AND PARTNERSHIPS ORGANIZED
FOR THE PURPOSE OF PRACTICING
A PROFESSION—§865.09, F. S.**

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Are partnerships and firms organized for the purpose of practicing a profession, such as attorneys, doctors, professional engineers, surveyors, certified public accountants, etc., within the purview and operation of §865.09, F. S.?

Said §865.09, F. S., makes it unlawful for any person or group of persons to operate a business in this state under a fictitious name, unless and until such fictitious name shall have been registered with the clerk of the circuit court of the county where the principal place of business is located. Such registration "shall consist of filing with the clerk aforesaid an affidavit signed by all interested persons, stating under oath the names of all those interested in the business enterprise, the extent of the interest of each, and the fictitious name under which said business is carried on . . ." (§865.09, F. S.).

The said statute defines fictitious names as including any "trade name, whether a single name or a group of names, other than the proper name or known names of those persons engaged in such business or profession." It is stated in 65 C.J.S. 13 and 14, §9, that "if the name under which the business is transacted fairly discloses the true name of the individual, the statute does not apply . . . On the other hand, if the name does not fairly disclose the true name of the individual, it is fictitious within the meaning of the statute." In 38 Am. Jur. 603, §14, it is stated that "the object or purpose of statutes which regulate the doing of business under a fictitious or assumed name not showing the names of the persons interested is, in general, to protect the public, to give them information as to the persons with whom they deal, and to afford protection against fraud and deceit." In general, a business name is deemed fictitious where it will not give notice to the average person in the locality of the names of the persons engaging in the said business.

In *Ray v. Amer. Photo Player Co.*, 46 Cal. App. 311, 189 P. 130, text 131, the name under which a person operated had been generally known for years and its personnel were also generally known; the business name used was held not to be fictitious. In *Lamberson v. Bashore*, 167 Cal. 387, 139 P. 817, the court held that the firm name "Lamberson & Lamberson" was not a fictitious name under the circumstances. Likewise, in *Tate v. Atlantic Oak Flooring Co.*, 179 Va. 365, 18 S. E. 2d 903, text 904, the name "A. E. Tate Lumber Company" was held, under the circumstances, not to be fictitious.

It appears from your file handed us with your request for

opinion that the business name in question is that of a firm of lawyers, practicing in this state, under the firm name of Smith, Brown, Black and Jones, or some similar name. It has been generally held that a partnership consisting merely of the surnames of the partners (without the initials or given names) joined by "&" or "and" are not assumed or fictitious names requiring registration under the statute. (*Cruse v. Wilson*, 92 So. 2d 270; 42 A. L. R. 516, 558; see also AGO 049-359, Biennial Report of the Attorney General, 1949-1950, p. 457.)

In light of the above statements, it is my opinion that persons doing business under a partnership or firm name consisting of merely surnames are not required to register under the provisions of §865.09, F. S., provided that such name fairly discloses the true name of the individuals; and persons doing business with them are fully advised with whom they deal. However, if the partnership or firm name is such as would be calculated to conceal or fail to reveal to the public generally the names of the persons operating the said business, persons doing business under such name or names are required to register the same.

The burden is on the businessman or firm to register as required by §865.09, if the business name does not reflect the true names of the operators; and persons doing business with them are not advised with whom they deal. Failure to register when required subjects members of the firm to the penalties mentioned in the statute. (See AGO 057-283, Biennial Report of the Attorney General 1957-1958, p. 342.)

Your question is therefore answered accordingly.

062-113—August 28, 1962

MOTOR VEHICLES

ISSUANCE OF ORIGINAL DRIVER'S LICENSE—§322.18, 322.21, F. S.

To: *George E. Adams, President-Elect, Florida County Judges' Association, Orlando*

QUESTION:

May a one-year driver's license be issued after September 1, 1962?

The statute involved in said letter is §322.18, F. S., dealing with driver's license renewals and *original* issuances. Subsections (2) and (3) of said section provide that in the case of renewals prior to Aug. 1, 1962, a renewal license would be issued during the birth month of the licensee for either a one- or two-year period, depending upon whether the licensee was born in an even- or odd-numbered calendar year. All renewals after Aug., 1962, would be for a two-year period.

Under the provisions of §322.18(5), F. S., applicants for an original driver's license are issued a one- or two-year license, depending upon whether they were born in an odd- or even-numbered calendar year. Said original license expires on the last day of the licensee's birth month in the first odd- or even-numbered calendar year following the year of issuance, as the case may be.

In my letter to Col. Kirkman, it was indicated that the legislature's intention, in changing the date of issuance of driver's licenses from Sept. 1 to the applicant's birth month, was to provide for the eventual issuance of a two-year license. The one- and two-year

renewal periods referred to in §322.18(2), F. S., were designed to provide a period during which a transition could be made for the two-year renewals. My letter also indicated that "effective Sept. 1, 1962, all original driver's licenses issued shall be issued to expire two years from the licensee's nearest birth month from the month of issuance."

There appears to be no confusion with respect to license renewals since after Aug. 1962, it is clear that renewals shall be for a two-year period. The difficulty is in construing §322.18(5) so that we may arrive at an interpretation that is both in keeping with the purpose of the legislative enactment and one in which the application thereof would be reasonable and just under the circumstances.

To interpret the above section as meaning that all *original* licenses shall expire two years from the licensee's nearest birth month from the month of issuance would seem to be in accordance with the legislative intent that there be a two-year license. However, this construction results in the expiration of a license without regard to the odd-even numbered year formula set forth in §322.18(5).

On the other hand, to conclude that *original* licenses shall expire strictly in accordance with the odd-even numbered year formula set forth in §322.18(5) would, in my opinion, result in an unjust, absurd or unreasonable situation. For example, if an original license were issued in December, 1962, to a person born in January, 1941, a literal reading of §322.18(5) (a) would mean that such license would expire January, 1963, since that year is the "first odd-numbered calendar year after the year in which the original license is issued." No literal interpretation should be given to a statute that will lead to an unreasonable conclusion or purpose not designed by the legislators (State v. Sullivan 95 Fla. 191, 116 So. 255). Moreover, this literal construction would also run counter to the legislature's intention of having a two-year license, which intention must be our guideline in construing a statute (Ervin v. Pen. Tel. Co., 53 So. 2d 647).

The situation finally narrows itself down to the point where the statute must be construed to (1) give effect to the legislature's intent of having a two-year license as well as (2) its intention that the odd-even numbered calendar year formula be utilized in *original* license issuance. It should be noted here that a two-year license is a license "issued to any person for a period of time more than one year"; and the one-year license is a license "issued to any person for one year or less." (§322.21(1) (a) (b), F.S.) Since the legislature intended that there shall be a two-year license (one issued for more than one year), it is apparent that a one-year license (a license issued for less than 12 months) is no longer available. Consequently, in the situation described above where an original license is issued in December, 1962, to an applicant born in January of an odd-numbered year, such license would not expire in January, 1963 (the first odd-numbered calendar year after the year the original license is issued), since that license would in effect be for a period less than one year and would, therefore, not effectuate the intent of the legislature.

In such circumstances as indicated in the aforementioned example, the *original* license issued to that applicant in December, 1962, would expire on the last day of January (his birth month), 1965. Such license would, therefore, be considered a two-year license since it is "for a period of more than one year" as contemplated by the legislature. (§322.21(1) (b), F. S.) Moreover, this construction

would be favorable to the licensee and would not result in penalizing him for being born in an odd-numbered year and being issued a license in an even-numbered preceding year.

It should be noted that situations might arise where a license issued in 1962 to an applicant born in an odd-numbered year would, nevertheless, expire in 1963; for example, a license issued in September or October of 1962 to an applicant born in December of an odd-numbered year would expire in December of 1963. This would be the result since such license would have been issued "for a period of more than one year" and would be considered as a "two-year license." (§322.21(1)(b), F. S.)

In conclusion, therefore, after Sept. 1, 1962, no *original* license would be issued for a period of less than one year; and should an applicant's year of birth result in the expiration of his license in less than one year, as described above, the license should be carried forward to his birth month in the next ensuing odd- or even-numbered year depending upon his year of birth.

It is recognized that the foregoing interpretation may contradict the strict letter of the statute in question; however, we must be guided by the *legislative intent* notwithstanding such contradiction; and we should not literally interpret a statute if it would lead to an unreasonable conclusion or a purpose not designed by the legislature (*State v. Wentworth*, 135 Fla. 565, 185 So. 357).

The foregoing interpretation gives due recognition to the legislative intent of providing for the issuance of a two-year license as well as recognizing the legislative intent of utilizing the odd-even numbered calendar year formula in connection with an original license.

Under the foregoing, a license originally issued to an applicant born in an odd-numbered calendar year would always expire in an odd-numbered year; conversely, a license originally issued to an applicant born in an even-numbered calendar year would always expire in an even-numbered year. Thereafter, the renewal date would always fall in the odd- or even-numbered calendar year, depending upon the applicant's year of birth. Following along with this pattern, licenses would have to be renewed in the odd- or even-numbered year to correspond with the applicant's year of birth, such renewal to be for a period of two years extending to the last day of the birth month of the given year, odd or even as the case may be. The important thing to be noted is that licenses would, under the aforementioned formula, always expire in an odd- or even-numbered year corresponding with the odd- or even-numbered year birth date of the licensee.

The odd-even termination sequence, as we are advised will promote an orderly and systematic procedure of issuing licenses, greatly facilitating both the original issuance as well as renewals. Recognition of this formula will provide a sound method of administering the driver's licensing provisions, which involve millions of drivers.

The conclusion reached in our letter of May 25, 1962, was intended to carry the meaning expressed above. Although not expressly stated in the concluding paragraph of said letter, the odd-even calendar year formula was intended to be preserved. The conclusion in the aforementioned letter is, therefore, modified accordingly.

062-114—August 29, 1962

TAXATION
DOCUMENTARY STAMP TAXES—CONTRACTS FOR SALE
OF DEAD STUMPS AND OTHER RESIN-PRODUCING
PRODUCTS FROM LAND—§§201.02, 201.08, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Are contracts and agreements between land-owners and others for the taking and using of dead resinous pine stumps and wood, standing timber, and other products of the land subject to documentary stamp taxes?

You transmitted to this office, with your request for opinion, a copy of an agreement between David Crow and W. C. Rasberry, joined by their respective wives, Gretchen Crow and Helen R. Rasberry, referred to in said agreement as "*sellers*," and the Heyden Newport Chemical Corp., a Delaware corporation, referred to in said agreement as "*purchaser*." By the said agreement the seller "for and in consideration of the payments to be made and the conditions to be kept and performed by the said purchaser . . . *hereby sells and conveys* to the purchaser all dead resinous *pine stumps* and dead resinous *pine wood* suitable for the manufacture of naval stores products lying and being on" the lands described in exhibit "A" attached to the said agreement "and made a part of this instrument." (Emphasis supplied). The consideration agreed to be paid by the purchaser to the sellers was a base price of \$4.75 per ton (2000 pounds), plus an upward adjustment in the purchase price where the price for WW gum rosin exceeds a stated price per cwt. Exhibit "A" above referred to describes approximately 44,937 acres of land lying and being in townships 1 and 2 north, ranges 15 and 16 west, which appear to lie and be in Washington county.

It is provided in the said agreement that "purchaser shall accept the lands of the seller in the condition in which it finds the same, it being agreed that they are acceptable and safe for the purpose to which the same shall be devoted under the terms and provisions of this agreement." The purchaser agrees to remove a minimum of 7500 tons of stumps and wood covered by this agreement in each contract year, provided said amount is available on the lands described and reasonably accessible. The seller is to designate areas to be worked from time to time. It is provided in the agreement that "this agreement supersedes and cancels the agreement between Vernon Land & Timber Co., and Newport Industries, Inc., dated March 15, 1954, previously assigned to the parties hereto, and shall remain in force until purchaser advises seller in writing that it has completed removal operations hereunder."

Under the said agreement the purchaser agrees to make an advance payment of \$150,000 on the purchase price of said resinous stumps and wood, on March 15, 1963, and additional advances on March 15, 1964, and March 15, 1965, of \$50,000 each. After resinous pine stumps and wood equaling the purchase price of \$250,000 have been taken, consideration for stumps and wood subsequently taken shall be paid to the sellers on a semi-monthly basis.

Section 201.02, F. S., imposes a documentary stamp tax: "On deeds, instruments or writings, whereby any lands, tenements, or other realty, or any interest therein, shall be granted, assigned,

transferred or otherwise conveyed to or vested in the purchaser, or any other person by his direction, on each one hundred dollars of the consideration therefor the tax shall be twenty cents . . ." (emphasis supplied). Does the conveyance, by a land owner, of resinous dead stumps and timber, standing timber, minerals, and other products of the land, to another, amount to a grant, assignment, transfer or conveyance of lands, tenements or other realty within the purview of said §201.02, F. S.

The U. S. Circuit Court of Appeals, 9th Cir. in *Milwaukee Land Co. v. Poe*, 31 Fed. 2d 733, considered an imposition of a federal documentary stamp tax on "26 sales of standing timber in the state of Washington and 24 sales of standing timber in the state of Idaho," imposed under the federal documentary stamp taxing laws as they existed in 1924, which imposed a stamp tax on "deeds, instruments or writings, whereby any lands, tenements, or other realty shall be granted, assigned, transferred or otherwise conveyed to, or vested in, the purchaser." The court held these sales of timber to be within the said federal statutes and subject to documentary stamp taxes. So far as we have been able to ascertain, this question has not been before the federal courts but once, that is, the above mentioned case. Section 4361, title 26, of the U. S. code, is substantially the same as the federal statute construed in *Milwaukee Land Co. v. Poe*, supra, as is also §201.02, F. S., above mentioned federal tax regulation, of 1962, in regulation 43.4361-2(9), provides that "*deeds to standing timber and to mines*" are subject to the federal documentary stamp taxes. If the instrument in question is an instrument granting, assigning, transferring or otherwise conveying an interest in the realty from which the resinous dead stumps and timber are to be taken, then it would appear to be subject to taxation under §201.02, F. S.

In *Walton Land and Timber Co. v. Long*, 135 Fla. 843, 185 So. 839, text 840, the court stated that "a sale of *standing timber* is a contract concerning an interest in land, within the meaning of the statute of frauds." The instrument here involved was an agreement by which the owner of real property purported to sell "all of the merchantable timber eight inches and up situated on" certain described lands. In *Walters v. Sheffield*, 75 Fla. 505, 78 So. 539, text 541, the court held that "title to standing timber is an interest in the land," also that "by the common law several sorts of estates or interests, joint or several, may exist in the same fee; as that one person may own the ground or soil, another the structures thereon; another the minerals beneath the subsurface and another the trees and wood growing thereon." In *McNair and Wade Land Co. v. Parker*, 64 Fla. 371, 59 So. 959, text 961, the court said, concerning timber and timber rights transferred by a timber deed, "as to the interest conveyed by the deed, it is plain that it carried no permanent fee simple interest in the land itself. It conveyed only timber growing upon the land, which is a kind of servitude which may be lost by nonuse or abandonment." This case involved a turpentine and timber deed. It has usually been held that instruments evidencing the sale of timber are within the statute of frauds (37 C.J.S. 631, §142). The statement is made in 73 C.J.S. 167, §7, that "coal, stone and other like materials constitute an essential part of the land itself and are not corporeal hereditaments, as is standing timber and a cave." On p. 163 of the same authority it is stated that real property "includes the natural products such as growing trees, grass, herbage and other natural products of the land . . ."

It is stated in 34 Am. Jur. 495, §6, that "it is also a general rule that a property right or estate in standing timber may exist and be held separately from that in the land on which it stands. In such case, the timber may still retain its character as realty . . ." In 42 Am. Jur. 200, §19, it is stated that "it is the settled law that *standing trees are part and parcel of the land in which they are rooted* and from which they draw their support, that is, they are *real property* . . ."

It is also "settled that a valid license to enter on land and cut and remove timber may be given by parol . . . A license to remove timber may also, of course, be created by written instrument." (32 Fla. Jur. 96, §7). "A license in real property may be defined as a personal and unassignable, and ordinarily revocable, privilege conferred either by writing or parol to do one or more acts on land without possessing an interest therein. Indeed the distinguishing characteristic of a license is that it gives no interest in land and that it may rest in parol." (33 Am. Jur. 398, §91). "The severance of trees under a license for such purpose, prior to the revocation thereof, operates, ordinarily, to vest in the licensee the title to the trees so severed" (34 Am. Jur. 522, §46). See also 54 C.J.S. 729-732, §29. Under a license to take timber, as above discussed, there is no sale of the timber unless and until it is severed from the land by the licensee.

The application of the documentary stamp statutes of this state to written agreements providing for the taking of timber and timber products from lands depends largely upon the nature and context of the agreement or agreements in question. If the agreement is in law a sale and conveyance of the timber, and not a mere license to enter and take timber, it is a conveyance of an interest in land or realty, within the purview of §201.02, and subject to taxation thereunder. If a license or lease in the nature of a license, permitting the taking of timber but not transferring title thereto prior to severance, then there has been no sale of an interest in land or realty and, therefore, is not taxable under §201.02, F.S. The nature of each document must be determined from the document itself aided by applicable circumstances.

We are of the opinion that the agreement handed us with the request for opinion, and discussed above, is in law the sale and transfer or conveyance of an interest in land and taxable under §201.02, F.S. We do not think that the advance payments therein provided for, on p. 3 et seq. of the said agreement, are written obligations to pay money within the purview of §201.08, F. S.; they are merely advances on the consideration to accrue under the terms of the agreement.

062-115—August 29, 1962

INSURANCE

PRE-NEED BURIAL CONTRACTS—REFUND IN EVENT OF CANCELLATION—§§639.13 AND 639.11, F. S.

To: J. Edwin Larson, State Treasurer and Insurance Commissioner, Tallahassee

QUESTION:

Upon the cancellation of a "pre-need burial contract" is the person who requests such cancellation entitled to receive a refund of the entire amount paid on such contract?

Upon the giving of five days notice a person who has procured a pre-need burial contract may demand a refund of the entire amount actually paid on such contract. (§639.13, F. S.). Seventy-five per cent of any funds received by persons offering in writing pre-need burial contracts are required to be deposited in certain designated securities. (§639.11(1), F. S.). The remaining 25% may be used by the writer of such contracts for current operating expenses. (§639.11(2), F. S.).

I am of the opinion that §639.11(2), F. S., should not be construed as a limitation on the clear and unequivocal language of §639.13, which authorizes a person who has procured a pre-need burial contract to demand a refund of the entire amount actually paid on such contract. However, said §639.11, F. S., is a limitation on the use of funds paid under a pre-need burial contract.

Hence, your question is answered in the affirmative.

062-116—August 29, 1962

PROCESS

ENFORCEMENT OF SEVERAL TYPES OF PROCESS AGAINST
SAME PROPERTY—§§2.01, 55.10, 28.21, 200.02, 199.22,
199.15, 205.10, 212.15, 443.15, F. S.

To: *Howard Anderson, Sheriff, Walton County, DeFuniak Springs*
QUESTION:

**Where two or more writs for the collection of money
(money executions, distress warrants, tax warrants, etc.)
are placed in the hands of a sheriff for enforcement, in
what order should said process be levied?**

It appears from the file before us that there have been placed in your hands for enforcement against the property of one person in your county several types of writs or processes for the enforcement of money claims. These writs or processes appear to have been delivered to you between Aug. 9, 1961, and June 13, 1962, inclusive, such writs or processes consisting of executions based on judgments issued by the circuit court and small claims court of your county, delinquent sales tax executions issued by the state comptroller, tax warrants issued by the Florida industrial commission, and two tangible personal property tax warrants issued by the county tax collector for Walton county. There appear to be some seven executions issued pursuant to money judgments, three sales and use tax warrants, one tax warrant issued by the industrial commission, and two delinquent tangible personal property tax warrants. We will consider the liens of these writs in the following order.

Liens of executions.—The statutes and laws of Florida have for many years declared the lien of common law and chancery judgments and decrees on real property, but have been silent as to the lien of such judgments and decrees on personal property.

On personal property.—The Florida Statutes do not directly declare or fix the lien of judgments and executions on personal property. However, §2.01, F. S., provides that "the common and statute laws of England which are of a general and not a local nature . . . down to the fourth of July, 1776, are declared to be of force in this state" when not in conflict of constitutional and statutory provisions of the laws of Florida. The liens of executions on personal property not being declared by Florida law, applicable English statutes enacted prior to July 4, 1776, would appear ap-

plicable. We note §16, Ch. 3, 29 Charles II, enacted in 1676, which provides that "no writ of fieri facias, or other writ of execution, shall bind the property of the goods of the party against whom such writ of execution is brought forth, but from the time such writ shall be delivered to the sheriff." The application of this statute was recognized by the Florida supreme court in *Love, Sheriff v. Williams*, 4 Fla. 126, text 134; *Kimball v. Jenkins*, 11 Fla. 115, text 123; *Goodyear Tire and Rubber Co. v. Daniel*, 72 Fla. 489, 73 So. 592, text 593; *Pasco v. Harley*, 73 Fla. 894, 75 So. 30, text 32.

On real property.—Section 55.10, F. S., provides that "no judgment or decree rendered by the circuit courts or any other courts of this state shall become a lien on real estate until a certified transcript of said judgment or decree is recorded in the judgment lien record as provided by §28.21," (emphasis supplied), F. S. Said §28.21 provides for a judgment lien record and record of foreign judgments in which shall be recorded all certified transcripts of judgments and decrees of the circuit courts and all other courts of this state, and judgments and decrees of the U. S. district courts held in this state, which may be presented for record. Said §55.10 originated as §§ 1 and 2, Ch. 19270, 1939. Similar provisions in the statute law of the state have appeared in the statutes since about 1834. The lien of judgments and decrees attach to real property as of the date of recording such judgment or decree, as to property then owned by the defendant, or if not then owned, as of the date acquired. Where the judgment or decree has not been recorded as contemplated by §55.10, the same rule that applies to personal property would seem to apply. When an execution is levied on real property, the lien of the execution dates back to the date of the recording of the judgment or decree.

Liens of tangible personal property taxes.—Under §200.02, F.S., "all tangible personal property taxes shall be a lien on all of the personal property of the taxpayer in the county in which they are assessed from the first day of January for which year the property is liable for assessment." (Emphasis supplied.) This section of the statutes further provides that the said lien "shall be superior to all other liens, except liens for other taxes, state, county and municipal." It seems evident that tangible personal property tax warrants issued by a tax collector in one county and delivered to the sheriff of another county would not attach as a lien to the property in such other county until delivered to the sheriff of such other county. The liens of tangible personal property tax warrants issued to the sheriff of the county wherein the taxes were levied for enforcement, or enforced by the tax collector himself, attaches to the personal property as of January 1 of the year for which the assessment was made. The effective date of these tax liens varies from that of court executions which date from delivery to the sheriff.

Liens of intangible personal property taxes.—Although you list no intangible personal property tax executions or warrants, we deem it advisable, for the benefit of all sheriffs' offices, that we comment on the lien of such executions or warrants. Under §199.22, F. S., "all intangible personal property taxes shall be a lien on all the real and personal property of the taxpayer in the county in which they are assessed from the time they become due . . . (and) in every other county from the time the tax execution is recorded in such other county" (Emphasis supplied.) Under §199.15, F. S., intangible personal property taxes are due Nov. 1 of the tax year, or as soon thereafter as the assessment roll comes

into the hands of the tax collector. These tax liens, as well as the lien for tangible personal property, vary from that of executions on money judgments, which become liens on personal property when delivered to the sheriff.

Liens of license tax executions.—Section 205.10, F. S., provides a method for the collection of delinquent license taxes under which the taxing official issued tax warrants for the collection of such taxes. Where a copy of the warrant which is delivered to the sheriff is filed with the clerk of the circuit court, the tax warrant becomes a lien upon *the real and personal property* of the person named in the said warrant. The priority of this lien appears to be determined as of the date of the filing of the said copy of warrant. Should no copy of the license tax execution or warrant be filed with the clerk of the circuit court, we are of the opinion that the warrant would become a lien upon delivery to the sheriff. The priority of these tax warrants or executions, as against executions issued on money judgments and decrees, is to be determined in the usual manner.

Liens of sales and use tax warrants.—When sales and use tax warrants or executions are issued by the state comptroller, or under his authority, they become liens when recorded in the office of the clerk of the circuit court upon the *real and personal property* of the taxpayer within the county. (§212.15, F. S.). The liens of these tax warrants or executions date from the recording of the tax warrant or execution in the office of the clerk of the circuit court. These tax warrants may be recorded in any county. The priority of these liens should be determined in the usual manner.

Liens of unemployment compensation warrants.—Section 443.15, F. S., provides a lien for unemployment compensation contributions, *upon the real and personal property* of the employer, from the time the warrant, execution or notice of lien is filed with the clerk of the circuit court and recorded by him in the proper record book. When such warrants or executions are delivered to the sheriff, their liens run from the recording aforesaid instead of from the time of its delivery to the sheriff.

Levy of executions, etc., by the sheriff.—Generally various execution creditors are entitled to be satisfied from the proceeds of an execution sale in the order of the legal priority of their executions (33 C.J.S. 293, et seq., §127). In 21 Am. Jur. 55, § 98, the statement is made that it is the duty of the execution officer to levy executions coming into his hands in the order received or according to the priority thereof. At common law priority was determined by the time the executions came into the hands of the sheriff; however, the statutes now provide for priority in some instances by the order of recording the writs in question. We feel that the priority of levies of an execution or similar writ should be determined by the priorities of the liens of the several processes as of the time of the making of the levy. The court, in *Love, Sheriff v. Williams*, 4 Fla. 126, text 136, indicates that the levy and sale of property under a writ subsequent in point of time to another will be valid and binding on the parties; although the sheriff may be liable for his failure to execute the writs in their proper order. Writs in the hands of a sheriff or other execution officer should be levied in the order of their priority. Where the liens of successive judgments or decrees attach in the order of recording according to statute, the writs of execution should be levied in the order of their priority.

Where the liens of executions, warrants, etc., are determined

by the time of record, a sheriff should execute such process in the order of their record in the county. Such sales would seem to be made subject to other liens apparent upon the records of the county. Where the liens of such process are not otherwise determined under the statutes of this state, they become liens on the property of the execution debtor in the order of their delivery to the sheriff, under the common law rule.

Writs of execution issued upon judgments of the courts of Florida, as to *personal property* are liens upon the personal property of the defendant from the time they come into the hands of the sheriff, unless an attachment may have been made in the case and the execution is dependent upon such attachment, in which case the lien of the execution dates from the date of the attachment; as to real property, from the date of the recording of the judgment in the judgment lien record. This information should appear from the face of the execution.

Tangible personal property tax warrants.—Tangible personal property taxes are liens on the personal property of the taxpayer from January 1 of the tax year, but not on the real property of the taxpayer. These liens are superior to all other liens, other than liens for other taxes generally, but would seem to be superior to other tax liens as to the property assessed. This being true, tax warrants for delinquent tangible personal property taxes should be deemed effective as of the date of the assessment of said tax, that is January 1 of the tax year.

Intangible personal property taxes.—Intangible personal property taxes are liens on all of the real and personal property of the taxpayer from the time due, which, unless otherwise shown, should be deemed to be November 1 of the tax year. These tax warrants should in most cases be deemed to be effective from the date due.

Tax executions.—Tax executions are issued for the collection of several types of taxes:

1. *License taxes.*—When tax warrants issued for the collection of license taxes are recorded with the clerk of the circuit court, they become liens on the real and personal property of the taxpayer from the date of recording. These warrants should in most cases be deemed effective from that date.

2. *Sales and use taxes.*—The tax warrants issued for the collection of sales and use taxes, like the liens of warrants for the collection of license taxes, become liens on the real and personal property of the taxpayer from the said recording. These warrants should in most cases be deemed effective from that date.

3. *Unemployment compensation.*—Tax warrants issued for the collection of unemployment compensation taxes, like the liens of warrants for the collection of license taxes, become liens on the real and personal property of the taxpayer from the said recording. These warrants should in most cases be deemed effective from that date.

We feel that the proper procedure, where the sheriff has in his hands two or more executions, tax warrants, or other process for the collection of money, is to levy all such writs then in his hands on the property in question at the same time, and make distribution of the proceeds of the sale according to the priority of the liens of the executions, tax warrants, etc. Where the proceeds from an execution sale is in excess of the sum or sums due on the collection process in the hands of the sheriff, such proceeds may be proceeded against by other creditors of the defendant in a proper manner.

The above and foregoing seems to outline the procedures by the sheriff when he has in his hands numerous executions, tax warrants and other collection process at the same time against one debtor.

062-117—September 5, 1962

**GAMBLING
LOTTERIES—TAVERNS; DRAWINGS
FOR CASES OF BEER**

To: *Lawrence E. Lyman, Assistant City Attorney, St. Petersburg*
QUESTION:

Does the following contest constitute a violation of our Florida lottery or gambling laws?

The owner of a tavern has a weekly drawing in which the winner of a prize (in this instance a case of beer), is selected by drawing a ticket from a jar filled with ticket stubs. The ticket stubs are one-half of a ticket which is given to a customer when he purchases a drink at the tavern. The other half is retained by the customer and the tickets bear matching numbers. Upon the selection of a winner by drawing a ticket, the winner is then given the case of beer and the owner requests a penny from the winner to "make it legal."

A game, contest, promotion, or other such scheme is not in violation of our constitutional or statutory prohibitions against lotteries unless it includes the elements of (1) a prize, (2) an award by chance, and (3) a consideration flowing from the participant to the sponsor.

It is evident that all three of these elements are present in the fact situation as stated above, at least prior to the time the owner of the tavern requests a penny from the winner "to make it legal." A prize is awarded by a drawing, which is perhaps the commonest device utilized in games of chance. Consideration consists in the time and effort of participants in going to the particular tavern where the contest is held in order to take part in the drawings. The purchase of a drink, entitling the buyer to a ticket stub, is, in effect, the purchase of a right to contend for the prize being offered. Also, the increased sales, advertising benefits and good will derived by the sponsoring tavern as a result of the drawings constitute consideration under our Florida lottery laws.

The only difference between the above fact situation and the typical drawing-type lottery scheme is that in the former the owner requests a penny from the winner at the approximate time that the prize is being awarded. I am of the firm opinion that this additional element or distinction does not clothe the scheme with the protective cloak of legality. It is said that the controlling fact in the determination of whether a given scheme is a lottery is determined by the nature of the appeal which the business makes to secure the patronage of its customers, and that if the controlling inducement is the lure of an uncertain prize, then the business or scheme is a lottery. *Kent v. City of Chicago*, 301 Ill. App. 312, 22 N. E. 2d 799. In the fact situation outlined above, only one of the participants in each weekly drawing, namely the winning ticket holder, is entitled to a case of beer upon payment of the requested penny. There is, thus, a predominating element of uncertainty or chance involved in the scheme. Does payment of the penny transform the case of beer into

a purchase rather than a prize? We hardly think so. When we consider the inequality in value between the "price paid" and the merchandise obtained, we are led to the inescapable conclusion that the penny merely constitutes an after-the-fact gift or donation to the sponsoring tavern owner. Consideration is involved in obtaining the prize because opportunities to win the beer devolve only upon those who go to the tavern and purchase drinks, thereby obtaining ticket stubs used in the drawing.

Many subterfuges have been designed to conceal real lotteries. Whatever the artifice, however, it is within the condemnation of the law if it in effect embodies the principle of a lottery and operates as such. (See *Commonwealth v. Lund*, 142 Pa. Super. 208, 15 A. 2d 839; *State v. Fox-Great Falls Theatre Corp.*, 114 Mont. 52, 132 P. 2d 689; *State v. Lipkin*, 169 N. C. 265, 84 S. E. 340, L. R. A. 1915 F. 1018, Ann. Cas. 1917 D. 137.) The drawing as held by the tavern in the above fact situation is illegal, within the contemplation of the statutory and constitutional prohibitions against lotteries in this state. In my opinion the obvious subterfuge or artifice employed by the sponsor in requesting a penny to "make" the scheme "legal" has no effect on the illegal character of the overall promotion.

062-118—September 4, 1962

EVIDENCE ADMISSIBILITY OF RESULTS OF BLOOD TESTS IN CRIMINAL PROCEEDINGS

To: *Philip G. Nourse, Assistant State Attorney, Fort Pierce*
QUESTION:

Where the operation of a motor vehicle has resulted in the death of a person, and where the operator of such motor vehicle is under lawful arrest for manslaughter as the result of such death, may such operator lawfully be compelled to submit, against his will, to having a sample of his blood taken from his body by a physician for testing to ascertain the alcoholic content of such operator's blood?

I think that if, and only if, the results of testing a blood sample taken under the circumstances recited in said question are admissible in evidence at the accused's trial, over his objection, then it may properly be said to be lawful to take the blood sample under those circumstances, since such results would not be admissible if the blood sample was obtained by an unlawful search and seizure or if the admission of the test results into evidence would violate the accused's right not to be compelled to furnish evidence against himself. The authorities outside of Florida are in conflict as to the admissibility of the results of testing blood samples taken from a person over his objection (see Ann. 159 A.L.R. 216-217; 22 A C.J.S. 551-553, Criminal Law, §651b). However, it appears that the Florida decisions do not permit a test result to be put in evidence when the tested blood sample is taken under such circumstances as are set forth in the above-stated question.

In *Touchton v. State*, 154 Fla. 547, 18 So. 2d 752, it appeared that Touchton was arrested for manslaughter as the result of his operation of an automobile and was carried to a hospital for treatment for the injuries which he sustained in the collision; that, while he was in the hospital, a sample of his blood was taken and

chemically tested; that the result of this test was submitted to the jury to prove intoxication; and that on appeal Touchton contended that this was a violation of his constitutional right against being compelled to be a witness against himself. In affirming Touchton's conviction the supreme court of Florida said:

... *The rule is set forth in 22 C.J.S., Criminal Law, §651, that: "Evidence resulting from a medical examination of accused for the purposes of the prosecution rather than for treatment, after an accusation has been made against him, is admissible where, in the absence of any compulsion, accused submits or consents to the examination."* (Emphasis supplied.)

and pointed out that Touchton made no claim that the blood extracted or the experiment made was against his will.

The Touchton case was cited with approval by our supreme court in *Berry v. State*, 36 So. 2d 784, 785, a murder case which involved the physical examination of the defendant Berry. The supreme court disposed of Berry's complaint against said physical examination by saying:

The third question relates to a physical examination made of the accused and the result of same being introduced in evidence. When the sheriff first came to the scene of the tragedy he observed that the zipper to appellant's trousers was down, and, in response to the sheriff's question, appellant said the zipper was busted by the Negro kicking him. For that and other reasons a physical examination of appellant was made, and no bruises were found. The purpose of this was to refute appellant's story that he had engaged in an altercation at the scene of the tragedy. The accused was under arrest and in jail at the time, *He did not object to removing his clothes and submitting to the examination. We find no error in the ruling of the trial court. See Touchton v State, 154 Fla. 547, 18 So. 2d 752.* (Emphasis supplied.)

The Touchton case was also cited with approval by the district court of appeal for the 2nd district in *State v. Wardlaw*, 107 So. 2d 179, 180. Wardlaw was convicted in the county judge's court for the offense of drunken driving. The results of a drunkometer test were admitted into evidence at the trial to corroborate the testimony of certain witnesses for the state. On appeal, the circuit court reversed the conviction upon the theory that it was error to admit into evidence the results of the drunkometer test. In reversing the circuit court's said ruling, said district court of appeal made the following statements:

We have carefully reviewed the record, and it appears that the respondent was fully advised of his constitutional rights prior to being offered the drunkometer test, that *he voluntarily took it and that his condition at the time of accepting the drunkometer test was such that he was fully conscious of his surroundings and was mentally capable of understanding and realizing the effect of his consent. See Touchton v State, 1944, 154 Fla. 547, 18 So. 2d 752.* (Emphasis supplied.)

The supreme court of Florida again cited the Touchton case with approval in *Odom v. State*, 109 So. 2d 163. Odom was convicted for rape. After his apprehension, he was taken to a hospital by a deputy sheriff for treatment of a wound

and there an examination was made by a physician. The physician testified that live, active male sperm cells were found on Odom's body, indicating recent intercourse or ejaculation. On appeal, Odom contended that the trial court erred in permitting the physician to relate the result of his said examination, upon the theory that this amounted to requiring Odom to testify against himself. In affirming the conviction, the supreme court cited the Touchton case as abundant authority for ruling against Odom's said contention, and pointed out that:

... the record is devoid of any showing that when the specimen was taken from appellant he expressed any protest. (Emphasis supplied.)

In the light of the pronouncements in the cited Florida cases, I think that, if an accused is compelled to submit to having a sample of his blood taken from his body, over his objection, for the purpose of testing such sample to ascertain the alcoholic content of his blood, then the results of such test are not admissible in evidence against the accused at his trial, because of the illegality of the taking of the blood sample.

Therefore, it is my opinion that the question stated above is properly answered in the negative.

062-119—September 28, 1962

TAXATION

REFUNDS—FUNDS FROM WHICH PAYABLE—§§193.40, 199.31, 200.36, CH. 129, F. S.; §4, ART. IX, STATE CONST.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. When a refund of a tax is ordered pursuant to §193.40, F. S., should the county pay the total refund, or should both the county and the county board of public instruction pay their respective pro rata portions thereof?

2. When a refund of a tax collected during a current year is ordered paid pursuant to said §193.40, and the tax collector has not disbursed all tax moneys collected, may the refund be made by the collector from funds on hand, thus causing the county and the board of public instruction to bear their pro rata share of the refund?

Section 193.40, F. S., authorizes the state comptroller to consider and pass upon applications for refunds of any over-payment of a tax, any payment where no tax is due, and any payment in connection with a bona fide controversy between the collector and the taxpayer as to his liability for the tax, in which case the payment may be made with the said controversy being litigated subsequent to payment. Such payments made in connection with a bona fide controversy resemble payments made under protest pursuant to the common law. This section further provides that

The board of county commissioners shall comply with the order of the comptroller in such matters by providing in the county budget for the ensuing year for the payment of such refunds and the board shall have authority to authorize such tax levies as may be necessary to provide the fund with which to make the refund so ordered. (Emphasis supplied.)

Section 200.36, F. S., makes a substantially identical provision for

the refund of tangible personal property taxes, including the same provision for levying taxes to provide a fund for the payment of the refund.

Under §199.31, F. S., providing for refunds of intangible personal property taxes, and §215.26, F. S., providing for the refund of taxes and other funds paid into the state treasury under like conditions, the refunds are made from the funds into which the payments have been deposited in the state treasury. These sections do not contemplate taxation to raise funds for the refund as do §§193.40 and 200.36, *supra*. This distinction should be kept in mind when construing said §§193.40 and 200.36, F. S.

Under the common law, and in this state in the absence of statute, once funds find their way into the public treasury they may be paid therefrom only as provided by law. Under the Florida constitution funds finding their way into the state treasury may be paid out only pursuant to a legislative appropriation (§4, Art. IX, State Const.). Chapter 129, F. S., requires that county funds be paid out only pursuant to the county budget or some legislative enactment. When county taxes are paid to the county tax collector and by him paid over to the proper state, county or district fund, such tax payments pass from his control and into the public treasury. In *Johnson v. Atkins*, 44 Fla. 185, 32 So. 879, a taxpayer had paid a license tax to the county tax collector, not under protest or compulsion or other notice to the tax collector, who transmitted the said funds to the public treasury entitled thereto. The tax not having been paid under a proper protest, the court held that it could not be recovered from the tax collector. In 51 Am. Jur. 830, §943, the statement is made that

if a taxpayer questions his liability to the tax assessed against him or the validity of the statutes or proceeding pursuant to which it was assessed, the ordinary procedure is for him to make payment under protest in order to lay a foundation for recovery back of money by showing that payment was not voluntary.

See also *Orlando v. Gill*, 128 Fla. 139, 174 So. 224, text 225 and 226; *North Miami v. Seaway Corp.*, 151 Fla. 301, 9 So. 2d 705, text 707; *Clements v. Roberts*, 151 Fla. 669, 10 So. 2d 425, text 426 and 427.

In general an action can be maintained against the tax collector for the recovery of taxes paid only when such taxes have remained in his possession, and have not been paid over or distributed to the authorities to whom payable. (84 C.J.S. 1276, §634). Where taxes are paid to the tax collector under a proper protest and notice of an intention to sue for its recovery, he pays the same over to the authorities entitled thereto at his own risk. The action is not against the tax assessor in his official capacity, but personally when the protest and notice of intention to sue have been ignored by him and the taxes paid over. See *Seaboard Air Line Railway Co. v. Allen*, 82 Fla. 191, 89 So. 555, text 558, where the statement is made that

the action may be maintained against the collector so long as the money remains in his hands, or if he had notice of the claim while the money was in his hands; but after he has in good faith paid it over to the state and county authorities for which he acts he is no longer liable.

In addition to the common law method of obtaining refunds of taxes paid under protest to the tax collector, the legislature, by

§47, Ch. 20722, 1941, now appearing as said §193.40, F. S., provided a proceeding under which refunds may be ordered by the comptroller, which seems to be an additional remedy to the common law remedy or a substitute remedy replacing the common law remedy. The refund provisions herein being considered were made and allowed, evidently under and pursuant to the third item in said §193.40, to-wit:

Where a bona fide controversy exists between the tax collector and the taxpayer as to the liability of the taxpayer for the payment of the tax claimed to be due, the taxpayer may pay the amount claimed by the tax collector to be due, and if it is finally adjudged by a court of competent jurisdiction that the taxpayer was not liable for the payment of the tax or any part thereof, . . .

the same should be refunded pursuant to said §193.40, F. S. As to the making of the refunds pursuant to said §193.40, said section provides:

The board of county commissioners shall comply with the order of the comptroller in such matters by providing in the county budget for the *ensuing year* for the payment of such refunds . . . (emphasis supplied).

This seems to contemplate the payment of refunds by the county commissioners under and pursuant to budgets prepared and adopted after the making and allowing of the said refunds. This statute seems to contemplate the making of provisions for such payments in the county budget for the ensuing fiscal year of the county subsequent to the allowing of such refunds.

The above mentioned methods of making refunds of taxes differ, in this connection, from the proceedings provided under §§199.31 and 215.26, F. S., where such refunds are paid from or charged to current existing funds, and no special taxes therefor are contemplated as in said §193.40, F. S. It is doubted that said §193.40, F. S., even contemplated the payment of such refunds from current funds.

In our AGO 061-4, Jan. 10, 1961, the statement is made that "it would seem to be a reasonable construction of said §193.40 to hold that the refunds may be made from existing budgets if funds be available therein, such as reserves for contingencies when clearly available." Such payments should be made from existing funds only when, at the time of payment, it is clear that such funds will be able to pay the existing appropriations therefrom and have a surplus sufficient to pay said refunds. There is no mandatory duty on the county officers to pay such refunds from existing funds; they may be paid from such funds when funds are clearly available therein.

From the above and foregoing, we are of the view that:

1. When a refund of a tax is ordered pursuant to §193.40, F. S., said section contemplates the payment thereof pursuant to the budget for the ensuing fiscal year, and not currently from county and school board current funds.

2. Under the rule above mentioned, it is doubted that the refund may be made by the tax collector from undistributed funds; at least without the joint consent or authority of both the county commissioners and school board.

062-120—September 28, 1962

**STATE AGENCIES—EMPLOYMENT CONTRACTS
DISTINCTION BETWEEN INDEPENDENT CONTRACTORS
AND EMPLOYEES—§§282.021-282.091, F. S.;
§4, ART. IX, STATE CONST.**

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

How may the distinction between an independent contractor and an employee be determined, by the state comptroller, when preauditing claims payable from different appropriations?

This question relates to contracts by and between state agencies, boards, commissions, and other bodies and individuals, under which such individuals agree to furnish designated services, information, materials, and things to such state agencies, boards, commissions and other bodies, for use by, or for the benefit of, such state agencies, boards, commissions and other bodies. Some such contracts provide for the furnishing of information needed for county industrial promotion; for the preparation of business research reports; furnishing of typing, stenographic or secretarial work; preparation and supervision of promotional and advertising material; investigations; piloting of airplanes; etc. These contracts raise the question of whether they are contracts of employment, or contracts by and between independent contractors; the determination of whether contracts of employment or of independent contractors may be material when determining the appropriation from which payable.

Sections 282.021-282.091, F. S., (Ch. 61-401) set out the legislative view of the fiscal affairs of the state government and its spending philosophy, for which reason they may bear upon the pre-auditing and payment of claims predicated thereon. Among these we find that (1) without legislative or budget board consent "no person may receive compensation simultaneously from more than one appropriation from any moneys in the state treasury or other state moneys" (§282.051, F. S.); (2) a distinction is made between salary appropriations and appropriations for other personal services (§282.021, F. S.); (3) persons paid from salary appropriations "... shall be state officers or employees and shall be eligible for membership in a state retirement system and those paid from (appropriations for) other personal services shall not be eligible for such membership" (§282.021, F. S.); (4) in distinguishing between payments from salary appropriations and from personal service appropriations "... it is intended to provide that those persons filling an authorized position on either a full-time or a part-time basis shall be classified and paid *from salaries appropriations* and those persons performing services for a state agency, but who are not filling an authorized position, be classified and paid from *(appropriations for) other personal services* ..." (§282.021, F. S.). Section 4, Art. IX, State Const., provides that "no money shall be drawn from the treasury except in pursuance of appropriations made by law." The phrase "appropriations made by law" refers to constitutional or statutory appropriations (Advisory Opinion, 43 Fla. 305, 31 So. 348; *State v. Green*, 95 So. 117, 116 So. 66). This brings us to the distinction between an employment and independent contractors and their compensation by the state.

Decisions by the Florida courts.—The supreme court of Florida in *Gentile Brothers Co. v. Florida Ind. Com.*, 151 Fla. 857, 10 So. 2d 568, text 570, and *Florida Ind. Com. v. State*, 155 Fla. 772, 21 So. 2d 599, text 604, defined an independent contractor as one "... who pursues an individual employment or occupation and represents his employer as to the results of his work but not as to the means by which the results are accomplished." In *Farmers and Merchants Bank v. Vocelle*, Fla. App. 106 So. 2d 92, text 95, the district court of appeal 1st Dist., said that "if the person serving is merely subject to the control or direction of the owner as to the result to be obtained, he is an independent contractor; if he is subject to the control of the person being served as to the means to be employed, he is not an independent contractor." In *King v. Young*, Fla. App. 107 So. 2d 751, text 753, the said district court of appeal further said that

the status of an independent contractor, as distinguished from that of an agent, consists of a contractual relationship by one with another to perform something for him, but the one so engaged is not controlled or subject to the control of the other in the performance of the engagement but only as to the result. Conversely, a principal in an agency relationship retains the right to control the conduct of an agent in regard to the engagement intrusted to him. It may be said that the recognized distinction between an agent and an independent contractor relationship is determined by whether the person is subject to or whether he is free from control with regard to the details of the engagement.

Other authorities.—The author of the article "Independent Contractors" in 27 *Am. Jur.* 481 and 482, §2, states that "there are many definitions of the term 'independent contractor.'" Perhaps one of the most frequently quoted is to the effect that an independent contractor is one who, in exercising an independent employment, contracts to do certain work according to his own methods, and without being subject to the control of his employer, except as to the product or result of his work. An independent contractor has also been defined as one who carries on an independent employment, in pursuance of a contract by which he has entire control of the work and the manner of its performance, as one who contracts to do a specific piece of work furnishing his own assistants, and executing the work in accordance with either entirely his own ideas or a plan previously given him by the person for whom the work is done, without being subject to the orders of the latter with respect to the details of the work.

In 56 *C.J.S.* 41-44, §3(1), it is stated that in the law of master and servant, an "independent contractor" is defined as one who, in rendering services, exercises an independent employment or occupation and represents the will of his employer only as to the results of his work and not as to the means whereby it is accomplished; one who, exercising an independent employment, contracts to do a piece of work according to his own methods, without being subject to the control of his employer except as to the result of his work; one who engages to perform a certain service for another, according to his own manner and method, free from the control and direction of his employer in all matters connected with

the performance of the service, except as to the result of the work. The term has also been defined as meaning one who contracts with another to do something for him, but who is not controlled by the other, or subject to the other's right to control with respect to his physical conduct in the performance of the undertaking; a person employed to perform work on terms that he is to be free from the control of the employer as respects the manner in which the details of the work are to be executed; or one who undertakes to produce a given result without being in any way controlled as to the method by which he attains that result.

In the same work, at p. 46, §3(2), it is stated that among the factors to be considered are whether the contractor is carrying on an independent business; whether the work is part of the employer's general business; the nature and extent of the work; the skill required; the term and duration of the relationship; the right to assign the performance of the work to another; the power to terminate the relationship; the existence of a contract for the performance of a specified piece of work; the control and supervision of the work; the employer's powers and duties with respect to the hiring, firing, and payment of the contractor's servants; the control of the premises; the duty to supply the premises, tools, appliances, material, and labor; and the mode, manner, and terms of payment. Ordinarily no one feature of the relationship is determinative, and all are to be taken into consideration in determining whether or not a person is an independent contractor.

It is stated in 42 C.J.S. 639 and 640, that the chief or master test, or the principal consideration in determining the question, (employee or independent contractor) is the right to control the manner of doing the work, so that, generally speaking, it may be stated that if the employee is under the control of the employer he is a servant or employee and not an independent contractor, but if, in the performance of the work, he is not under the control of the employer he is an independent contractor; it is not, however, the actual exercise of the right by interfering with the work but rather the right to control which constitutes the test.

Several of the contracts examined by us provide that the "contractor shall be responsible . . . (to the state board, etc.) in the performance of his (or her) duties and shall make such reports, and perform such services in accordance with the duties above specified, and shall perform such other services as may be determined by the . . . (employing state agency)." In some of the contracts the employing state agency "shall provide free office space, office supplies, telephone and telegraph service, and equipment for the contractor." In most instances the compensation is payable monthly, evidently in the same manner as would a salary in many instances. These provisions although not within themselves conclusive, strongly evidence an *employment* and not an independent contractor arrangement.

The above and foregoing define the relationship of an employee and that of independent contractors, thereby providing a formula whereby the distinction between an employee and an independent contractor may be made.

062-121—September 28, 1962

TAXATION

CONSTRUCTION OF §323.15, F. S.—PAYMENT OF OCCUPATIONAL LICENSE TAXES UNDER §205.53, F. S.—

CH. 323, §§323.01, 195.10, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Where a transfer and storage company, licensed and operating under and pursuant to Ch. 323, F. S., and engaging in a general warehouse and storage business, wherein, for a charge, goods, wares and merchandise are stored, when not in transit and unconnected with the company's business of hauling and trucking, is such company subject to an occupational license tax under §205.53, F. S.?

Section 323.15, F. S., imposes a mileage tax upon auto transportation companies qualified under Ch. 323, F. S., as therein provided; however, §323.15(2), in the latter part thereof, provides that:

The mileage tax provided for in this section shall be in lieu of all other taxes and fees of every kind, character and description, state, county or municipal, including excise and license taxes levied or imposed against such auto transportation companies, or the operation of such business, and facilities thereof, or their property, except ad valorem taxes levied upon the property other than motor vehicles of such auto transportation companies and except the gasoline tax and motor vehicle fuel tax, and except the motor vehicle license tax now or hereafter provided for by law.

Section 323.15, F. S., was first derived from §16, Ch. 14764, 1931, and the above quoted portion of said section has remained unchanged in substance since its enactment in 1931, although some change in language has been made. The provision appears to have first appeared as a part of §14, Ch. 13700, 1929, which appears to have been replaced by said Ch. 14764, 1931. Said §14 of Ch. 13700, 1929, provided that:

... the mileage tax provided for in this section shall be in lieu of all other taxes and fees of every kind, character and description, except ad valorem taxes levied upon the property of such auto transportation companies and except the gasoline tax, and except the motor vehicle license tax as now provided for ...

Under said §323.15, F. S., auto transportation companies paying the mileage tax therein provided for are given an exemption from occupational license taxes "levied or imposed against such auto transportation companies, or the operation of such business and facilities thereof, or their property . . ." Section 323.01(7), F. S., defines auto transportation company as meaning "... all persons, their lessees, trustees or receivers, owning, controlling, operating or managing any motor propelled vehicle not usually operated on or over fixed rails, used in the business of transporting persons or property for compensation over any public highway in this state . . ." This definition is deemed to include:

(a) Every such person owning, leasing, using or exercising dominion over motor vehicles operated in common carriage of either persons or property for compensation over public highways over regular routes or on fixed schedules or between fixed termini or in "charter" carriage as herein defined.

(b) Every such person owning, leasing, using or exercising dominion over motor vehicles operated in the transportation of persons or property over public highways under contract or private carriage for compensation.

(c) Every such person, owning, leasing, using or exercising dominion over motor vehicles operated in the transportation of persons or property over public highways "for hire" as defined and regulated by this chapter and as further defined and regulated by the commission under the authority conferred on it by this chapter.

The license taxing statutes, at least since the adoption of Ch. 6421, 1913, appear to have imposed a license tax on warehousemen operating warehouses in this state. The mileage tax imposed on auto transportation carriers is in the nature of a license tax and no such carrier may legally carry on such a business unless the said tax is paid. Railroads as common carriers pay a license tax under §195.10, F. S. It is stated in 53 C.J.S. 727, §68, that:

It is no defense to a prosecution for conducting a business or occupation without a license that accused has a license for another business or occupation distinctly different in character, . . .

A person holding an occupational license to practice as an attorney may not practice as a doctor, dentist, or other profession under his attorney's license. Where, on the one hand a warehouseman receives goods under a contract which constitutes him a warehouseman, he is not transformed into a common carrier by reason of his undertaking to transport the goods to his warehouse, or to forward the goods by direction of the owner; and on the other hand, a carrier which stores goods merely as incidental to the transportation thereof is not a warehouseman.

Where a transfer company receives goods for transportation from one point to another, the contract is primarily one of transportation, which is not transformed into one of warehousing merely because such goods may be stored in the company's housing facilities for a time incidental to the transporting of the goods; for instance, where the goods are stored during the time between the termination of their transportation and delivery to the consignee. Such storage continues for a reasonable time after delivery before it ceases to be storage in connection with the transportation and is converted into a warehousing relationship. In *Arlington v. Central of Georgia Railway Co.*, 127 Ga. 721, 56 S. E. 1015, text 1017, certain goods had been delivered to the railroad to be delivered to a consignee, which goods could not be delivered because of the failure, concerning which the court said that:

When the shipment has been completed, and the consignee fails or refuses to call for and receive the goods within a reasonable time after they have reached their destination, it stores such goods in its freight house, and charges for such storage in the amounts and in the manner which the railroad commission has provided may be done by common carriers of freight. It neither seeks nor desires to

have goods for storage. When compelled, on account of the conduct of the consignee, to store them, it exacts only the storage fees provided by that tribunal, which regulates its business as a common carrier. If it cannot be taxed as a common carrier, (municipal taxes not permitted against common carriers) a mere incident to its business in such capacity cannot be segregated from its business in its entirety and made subject to an occupation tax.

This seems to be a reasonable rule to be applied here.

The above stated question is answered in the affirmative. Care must be exercised to apply the rule announced in the above *Arlington v. Central of Georgia Railway Co.* case when determining whether or not the transaction of storage is unconnected with the business of hauling and trucking.

062-122—September 28, 1962

**CRIPPLED CHILDREN'S COMMISSION
EXPENDITURE OF FUNDS FOR TREATMENT AND
CORRECTION OF DEAFNESS—CH. 391; §391.01, F. S.**

To: *Henry I. Langston, Director Florida Crippled Children's Commission, Tallahassee*

QUESTION:

May the loss of hearing or deafness, due to accident, disease, congenital deformity or any other condition, be construed to be an impairment or crippling of the physical functions or movements of a child for which care or treatment may be provided by the Florida crippled children's commission?

Chapter 391, F. S., is an act creating the Florida crippled children's commission to provide care, treatment and hospitalization of crippled children. Section 391.01, F. S., defines a crippled child as any person of normal mentality under the age of 21 years whose *physical functions or movements are impaired by accident, disease or congenital deformity* regardless of whether or not such impaired physical functions or movements are due to an orthopedic condition; it shall *include children suffering from any disease or condition which is likely to result in a crippling condition*. The *services, duties and functions of the commission are not limited to orthopedic cases*.

Dorland's medical dictionary, 23rd Ed., defines "deafness" as a lack or loss, complete or partial of the sense of hearing. It continues with numerous definitions as to various types of deafness which are generally attributed to accident, disease, congenital or some other physical condition.

In the same dictionary we find the following definitions:

"Accident"—an unforeseen occurrence, especially one of injurious character; an unexpected complicating occurrence in the regular course of a disease.

"Disease"—a definite morbid process having a characteristic train of symptoms. It may affect the whole body or any of its parts, and its etiology, pathology, and prognosis may be known or unknown.

"Congenital"—existing at birth.

Black's law dictionary defines the word *crippling* as the equivalent of words "physical disability."

Webster defines the word *cripple* to deprive of strength, activity or capability for service.

In Words and Phrases, Vol. 10, we find:

Crippled child—"A crippled child . . . is a person under 21 years of age who, by reason of a physical defect or infirmity whether congenital or acquired by accident, injury or disease, has been deprived of strength, activity, or capability for services or use, in any part of the human body."

In 24B C.J.S., p. 718, we find among other things the following: The word *crippled* has been distinguished from *maim* and the word *crippling* has been held to be the equivalent of physical disability.

In view of the foregoing it is my opinion that the definition of what shall constitute a crippled child as defined by the legislature in §391.01, supra, may include any child whose physical functions or movements are impaired by deafness.

It might also be noted that for a number of years, the commission has been providing facilities and services for the treatment of children who are diagnosed as having a crippling or impaired physical condition due to harelip, cleft palate, congenital cataract, cerebral palsy and cardiac condition, as well as the amputee, orthopedic and plastic cases; such services have apparently been rendered with the blessings or approval of the Florida legislature through the biennial appropriations to the commission. Hence, from a layman's point of view it would appear to me that either partial or total deafness would result in a sufficient physical disability to justify the commission expending funds for the purchase of equipment and services for the prevention and treatment of deafness. (See AGO dated Sept. 19, 1935, to the Florida crippled children's commission, p. 502, 1935-36 biennial report of the attorney general.)

Your question is answered in the affirmative.

062-123—October 1, 1962

BEVERAGE LAW—ADMINISTRATION

SALE OF INTOXICATING BEVERAGES—ZONING BY MUNICIPALITIES—§§561.44 (1), (2), 561.34 (1) (c), (d), F. S.

To: Mrs. Lorena Spivey, City Clerk, Okeechobee

QUESTION:

May a municipality enact a zoning ordinance prohibiting the sale of intoxicating beverages within certain designated areas?

Section 561.44 (1), F.S., provides as follows:

(1) Incorporated cities and towns are hereby given the power hereafter to establish zoning ordinances restricting the location wherein a vendor licensed under §561.34 may be permitted to conduct his place of business and no license shall be granted to any such licensee to conduct a place of business in a location where such place of business is prohibited from being operated by such municipal ordinance; provided, however, such powers shall not apply to vendors licensed under §561.34 (1) (c) and (d).

Section 561.34 (1) (c) and (d), F.S., relates to vendors of malt beverages containing alcohol of more than 1% by weight for consumption off the premises only and vendors of beverages con-

taining alcohol of more than 1% by weight and not more than 3.2% by weight for consumption off the premises only in counties that have voted against the sale of intoxicating beverages.

From an examination of the above-quoted authorities, it is clear that although a municipality may prohibit the sale of intoxicating beverages within certain areas thereof, the said municipality is without authority to prohibit through zoning ordinances the sale of beer where said beer is to be consumed off the premises of the vendor's establishment.

In AGO 058-41, I concluded as follows:

There is no question but that municipalities, under the provisions of §561.44 (1), F.S., and the several counties of the state, under §561.44 (2), F.S., where the sale of intoxicating beverages has been approved by the electorate, have the authority through their respective governing bodies to establish zones in the city or county, as the case may be, wherein licensed vendors of alcoholic beverages may be permitted to conduct their places of business and this authority goes to every type of retail dealer except a person who is licensed to sell beer by the package only for consumption off his premises.

You have provided me with a copy of ordinance 258 of the city of Okeechobee, dealing with the sale of intoxicating liquors within 700 feet of any established church or school, said ordinance reading in pertinent part as follows:

No license under the provision of this ordinance, shall be granted to a vendor to sell, barter or exchange or otherwise deal in beer, wine or other intoxicating liquors of any kind or nature, regardless of name, whose place of business shall be within 700 feet of any established church or school, which said distance shall be measured by following the shortest route of ordinary pedestrian travel along the public highway or street from the nearest point of said place of business to the nearest point of said church or school.

In view of the foregoing comments, the city of Okeechobee is without authority to prohibit the retail sale of beer for consumption off the dealer's premises; and insofar as ordinance 258 seeks to so prohibit, it cannot be enforced.

It may be that the city council of the city of Okeechobee would desire to amend its ordinance in this regard.

This ordinance further provides a method of measuring the distance between any church or school and the premises involved; and although I cannot say that said method is improper, I might suggest that the city adopt the language found in §561.44 (2), F.S., wherein it is provided in pertinent part as follows:

... (which distance shall be measured by following the shortest route of ordinary pedestrian travel along the public thoroughfare from the main entrance of said place of business to the main entrance of the church) and, in the case of a school, to the nearest point of the school grounds in use as part of the school facilities . . .

Subject to the above-mentioned conditions, your question is answered in the affirmative.

062-124—October 1, 1962

SECURITIES COMMISSION

RELEASE OF STOCK HELD IN ESCROW—§517.18, F.S.

To: *Dannitte H. Mays, III, Director, Florida Securities Commission, Tallahassee*

QUESTION:

May the Florida securities commission release stock held in escrow pursuant to §517.18, F.S.?

The conditions under which the subject release is to be made are described in your letter essentially as follows:

X company will make an offer to purchase all the outstanding securities of Y company. In connection with such offer, the beneficial owner of shares of stock in Y company (presently held in escrow pursuant to §517.18, F.S.) has agreed to waive and surrender any right he may have in and to such shares. It is said owner's desire that such shares be returned by the commission to Y company in order that they may be cancelled upon Y company's books. The word, "cancelled," would be written upon the face of such shares before they left the office of the securities commission should they be returned to Y company.

You further state that the beneficial owner referred to above would receive no consideration or remuneration in any form as a result of the cancellation of the shares in question. Should X company purchase the outstanding shares of Y company, the beneficial owner of the shares now held in escrow would be in the same position as all other stockholders of the company in that he would receive payment from X company for the shares he held in Y company on only those shares which he purchased at the prevailing price on the date of purchase.

In 1940 my predecessor in office advised the Florida securities commission in AGO 040-958 that the purpose of §517.18, F.S. (§14 of the uniform sale of securities act), was to prevent those who obtained their stock in exchange for intangible assets from selling on an equal basis with those who had purchased their stock with cash until such time as the business enterprise had begun to make substantial profits.

In that opinion it was concluded that "there is nothing in §14 (§517.18, supra) which would prevent the withdrawal of stock from escrow for the sole purpose of canceling same." (Emphasis supplied.)

In addition to the view expressed in AGO 040-958, it is noted that §517.18, supra, contemplates that upon dissolution of the corporate entity, the promoter may participate in the assets of the corporation after all other shareholders have been paid in full.

In 19 C. J. S., Corp., §1622, it is stated that a consolidation is frequently effected by the purchase by one corporation of all the shares of another corporation and becoming the sole stockholder of the selling corporation, or, since the corporation cannot become a permanent stockholder in another unless the right is conferred by statute, by issuing its own shares directly to the stockholder of the selling company.

It is further stated in that authority in §1626 that as a general rule a consolidation effects a dissolution of the original corporation and brings into being a new corporation.

If a dissolution is effected, the promoter would be entitled to

share in the assets of the corporation after all other shareholders are paid in full. Since it is contemplated that upon dissolution the promoter is not to participate by virtue of his promotional shares, the withdrawal of said shares from escrow with the legend "cancelled" affixed on the face thereof would seem to be authorized.

In light of the above comments, I suggest that before the requested withdrawal is authorized, the promoter be required to submit that quantity and quality of evidence which in the judgment of the commission is necessary in order to reflect: (1) whether the requested withdrawal would permit a benefit to the promoter; (2) whether the said withdrawal would act to the detriment of other shareholders; (3) whether a dissolution of the proposed selling corporation is contemplated.

The final determination of the issue presented must be made solely on the evidence submitted to the commission; and if there is any question concerning the possibility of a benefit flowing to the promoter, injury to other shareholders, or whether a dissolution is to be effected, the issue must be resolved in the public's favor, and the request for withdrawal should be denied.

Your question is therefore answered in the affirmative, subject to the above-mentioned conditions.

I return herewith your file relating to the original registration of the securities involved.

062-125—October 1, 1962

PUBLIC OFFICERS

COUNTY SCHOOL OFFICERS—HOLDING MORE THAN ONE PUBLIC OFFICE—§15, ART. XVI, STATE CONST.

To: *Thomas D. Bailey, State Superintendent of Public Instruction, Tallahassee*

QUESTION:

May a person, otherwise properly qualified, in a county of this state hold at the same time the offices of school trustee and judge of the small claims court?

Section 15, Art. XVI, State Const., provides, in part:

... and no person shall hold, or perform the functions of, more than one office under the government of this state at the same time; provided, notaries public, militia officers, county school officers and commissioners of deeds may be elected or appointed to fill any legislative, executive or judicial office.

Since a school trustee is a county school officer, your question is therefore answered in the affirmative.

062-126—October 1, 1962

MILK COMMISSION

LEGALITY OF COMMISSION ORDER 220-6.14 AND AMENDMENT FIXING PRICE OF MILK—§501.13 (7), F. S.

To: *Charles O. Andrews, Jr., Chairman, Florida Milk Commission, Orlando*

QUESTIONS:

1. Is original order 20-24 (now known as 220-6.14) a price order so as to require the advertisement of notice

of public hearing, as such, as required by law as a condition precedent to the establishment of any price to be paid at any level for milk?

2. Is the recent amendment to order 20-24 (now known as 220-6.14) invalid for the same reason?

3. Could any fair trade order of this commission have the effect of establishing a floor for the sale of milk at wholesale or retail?

At the outset, may I respectfully direct your attention to §501.13 (7), F.S., which provides as follows:

The commission may upon its own motion or upon application from time to time, alter, revise or amend an official order theretofore made with respect to the prices to be charged or paid for milk. After making such investigation and before making, revising or amending any order fixing the price to be charged or paid for milk, *the commission shall give a hearing thereon to all parties interested upon reasonable notice to such interested parties and to the public of such hearing in such newspaper or newspapers as in the judgment of the commission shall afford sufficient notice and publicity.* Such order of the commission may be reviewed by appeal as provided in this chapter at the instance of any aggrieved person appearing of record at the hearing either in person or by personal representative and opposing the making of the order.

In your request for opinion you relate that the subject order was originally adopted as a fair trade order and not advertised in the manner required by the above statute. This "fair trade" order you advise has been amended several times, the last on Aug. 24, 1962. You further advise that the order originally provided for a calculable minimum wholesale price below which distributors could not sell to retail establishments and the most recent amendment provided that "milk and milk products shall not be sold at retail in any milk marketing area at a price below the average . . ."

I am of the view that the order as originally passed, as well as after amendment clearly constitutes an order fixing the price to be charged or paid for milk and would, therefore, be required to be adopted only after advertisement of notice of public hearing as required by the statute. It is our opinion the original order and the amendments thereto are illegal.

Insofar as question 3 is concerned, further study of it is required by us and you may expect to hear from us shortly. We understand from conversations we have had with you that answers to questions 1 and 2 are urgent.

062-127—October 1, 1962

**STATE OFFICERS AND EMPLOYEES
UNEMPLOYMENT COMPENSATION BENEFITS AS WAGES
UNDER §222.15, F.S.—PAYMENT TO ESTATE OF DE-
CEASED EMPLOYEE—§§443.08, 443.10, 735.05, F.S.**

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

May unemployment compensation benefits due a state employee at the time of his death be paid to his survivors in accordance with §222.15, F.S.?

Section 222.15, F.S., provides that:

It is lawful for any employer, in case of the death of an employee, to pay to the wife or husband, and in case there is no wife or husband, then to the child or children, provided the child or children be over the age of eighteen years, and in case there is no child or children, then to the father or mother, any wages or traveling expenses that may be due said employee at the time of his death.

When the above stated question is applied to said §222.15, F.S., the question arises as to what is the nature of unemployment compensation, and may such compensation be classified as "wages or traveling expenses" for the purposes of said section of the statutes.

Under §443.08, F.S., each employer in this state within the unemployment compensation statutes of this state is required to make the stipulated contributions to the unemployment trust fund created and established by §443.10, F.S. The state treasurer is the ex-officio treasurer and custodian of this fund and is required to administer it "in accordance with the directions of the commission." This unemployment compensation trust fund provides the fund from which unemployment compensation benefits are paid. Funds paid into the state unemployment compensation trust fund are paid into the U.S. treasury, and credited to a special fund, and may be withdrawn therefrom only for paying unemployment benefits (*People v. U.S.*, 328 U.S. 8, 66 S. Ct. 841, 90 L. Ed. 1049, text 1052). Payments from this trust fund must be distributed in strict accordance with the terms of the unemployment compensation statutes (81 C.J.S. 357, §241).

The court of appeals of Alabama, in *Dept. of Industrial Relations v. Drummond*, 1 So. 2d 395, text 401; *Tenn. Coal, Iron and Railroad Co. v. Martin*, 36 So. 2d 535, text 536; and *Dept. of Industrial Relations v. Stone*, 53 So. 2d 859, text 861, deemed unemployment compensation to be "in the nature of insurance." To the same effect see also the opinion of the Court of Common Pleas of Ohio in *Reeves v. Board of Review*, 118 N. E. 2d 159, text 160; at least to a limited extent (*Berdan v. Unemployment Compensation Board*, 153 Pa. Super. 49, 33 A. 2d 264). Unemployment compensation is referred to in 48 Am. Jur. 520, et seq., §10 et seq., as unemployment insurance. The Supreme Court of Florida in *Florida Industrial Commission v. Growers Equipment Co.*, 152 Fla. 595, 12 So. 2d 889, text 892, stated that "... the well being of wage earners and the welfare of the state require the enactment of a compulsory unemployment insurance plan, and the setting aside of financial reserves for the benefit of persons without employment through no fault of their own." Contracts between individuals whereby one contracting party agrees to compensate the other, in whole or in part, during unemployment have been held to be insurance contracts (*State v. Barton*, 92 Neb. 666, 139 N. W. 225; *Smythe v. Home Life and Accident Ins. Co.*, 134 La. 368, 64 So. 142, text 143). See also definition of "social insurance" in *Black's Law Dictionary*. In *Friedman v. American Surety Co.*, 137 Tex. 149, 151 S. W. 2d 570, text 578, the supreme court of Texas recognized that the dominant purpose of the state's unemployment compensation act "is to provide insurance or compensation to employees, who come under it, in times of unemployment." However, the Texas court remarked that "the right of such employees to enjoy or participate in the fund in times of unemployment should be regarded as a part of their compensation or wages."

The word "wages" usually relates to the compensation given to a servant or hired person for his services; remuneration from an employer to his servant or hired person (Black's Dictionary; 44 Words and Phrases 490, et seq.; 92 C. J. S. 1035, et seq.). Section 222.15, F. S., seems to be limited to wages or compensation due an employee by his employer. Unemployment compensation is not payable from an employer to an employee for services rendered; but by the state to an unemployed whose employment has ceased due to conditions beyond his control. Section 222.15, F. S., authorizes the payment of an employee's wages, by an employer, to his or her next of kin, as described in said section, when the employee is deceased. The unemployment compensation is payable, not by the employer, but by the state, to the next of kin of the employee from funds belonging to a state trust fund.

The above authorities and observations lead us to a negative answer to the above stated question; however, this answer merely holds that the unemployment compensation due the employee at the time of his death may not be paid under and pursuant to said §222.15, F. S., as wages. Such unpaid unemployment compensation is property of the decedent's estate and is payable under the statutes of descent and distribution to the personal representative or in accordance with §§735.05, et seq., F. S., under orders of administration unnecessary when applicable.

062-128—October 1, 1962

ELECTORS AND ELECTIONS
ABSENTEE REGISTRATION BY SERVICE ACADEMY
CADETS—§97.063, F. S.

To: Mrs. Easter Lily Gates, Supervisor of Registration, Broward County, Fort Lauderdale

QUESTION:

Do cadets who are enrolled at armed forces service academies meet the definition requirements provided in §97.063, F. S., relative to absentee registration?
 Section 97.063, F. S., provides:

Members of the armed forces while in the active service, and their spouses, shall be entitled to register absentee.

Various reliable military authorities report to this office that cadets attending service academies such as the air force academy at Colorado Springs, the naval academy at Annapolis and the military academy at West Point, receive allowances and subsistence from the U. S. government, wear a uniform representative of their particular branch of service, are subject to the uniform code of military justice, acquire longevity status for pay purposes while at the academy and in at least one instance (Annapolis) hold a military rank junior to that of a commissioned officer, but senior to that of warrant officers. In addition, we are advised that cadets are required to sign a contract with the government obligating themselves for a stipulated number of years of reserve or active duty training prior to or following graduation from the academy, depending upon whether the student maintains a satisfactory standing in order to receive a degree and commission.

This being the case, it would appear that duly enrolled service academy cadets are, in every sense, an integral part of

the armed forces and are as much on active duty from the standpoint of being able to return home to register to vote as is any other enlisted man or officer on active duty with the armed forces. In view of the fact that the intent of the law—§97.063, F. S.—was to provide an exception for members of the armed forces who are not ordinarily available to return to this state for voter registration purposes, it would seem that service academy cadets would fall within the category intended to be covered by the exception to the general rule that those desiring to register must present themselves in person before the county supervisor of registration.

The comments and conclusion reached herein are not intended to be extended to any other group of students other than those attending a recognized service academy and are not in particular to be extended to students enrolled in the reserve officer training program at the various colleges and universities throughout the U. S., as these students are not restricted to the location of their study and subject to other requirements of the armed forces as are the service academy cadets.

Based upon the comments and reasons set out above your question is answered in the affirmative.

062-129—October 2, 1962

TAXATION

LICENSES AND LICENSE TAXES—MANUFACTURERS OF ICE FOR SALE THROUGH THE USE OF MACHINES—§§205.01, 205.48, 205.59, CH. 205, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are persons engaged in the manufacture of ice for commercial sale, through the use of ice manufacturing machines, subject to an occupational license and license tax, and if so under what section taxable?

The statutes and laws of Florida have, at least since the enactment of Ch. 5106, 1903, imposed a license tax upon those engaged in the business of manufacturing ice for sale to the public. Section 15 of said Ch. 5106 provided that "owners or operators of ice factories or plants" should pay an occupational license tax, the amount of which was dependent upon the capacity of the factory or plant in tons. This section became §454, G. S. 1906. This statute seems to have remained in force and effect until the enactment of Ch. 6421, 1913, §27 of which, in part, provided that "ice factories, including cold storage plants connected therewith, and the right to sell at wholesale and retail, shall pay a license tax" dependent upon the plant's capacity in tons of ice. This provision became §907, R. G. S., 1920. This provision appears to have remained in force and effect until the enactment of Ch. 18011, 1937. Although Ch. 14491, 1929, made many changes in the license taxing laws of this state, it contained no provision in conflict with said §907, R. G. S., and §31 of the said 1929 act provided that nothing therein "shall be construed to repeal any license tax now imposed by law, as this law is intended to supplement the statutes in force."

From the above and foregoing it is evident that at the time of the enactment of Ch. 18011, 1937, now appearing with amendments and changes as Ch. 205, F. S., that the manufacture of ice

for commercial sale was deemed a business subject to licenses and license taxes thereunder imposed. It has been held in some cases that the production of ice by artificial means is manufacturing or a manufacturing plant (*U. S. Cast Iron Pipe and Fdry. Co. v. Henry Vogt Machine Co.*, 182 Ky. 473, 206 S. W. 806, text 811; and 55 C. J. S. 694 and 695, Section 4). In *Hoffman & Crowell v. Harison*, 171 Ga. 792, 156 S. E. 685, domestic electric refrigerators were held to be ice machines under a license tax law imposing a license tax on dealers in ice machines.

Section 205.01, F. S., provides that:

No person shall engage in or manage any business, profession or occupation, for which an occupational license tax is required by this chapter or other law of this state, unless a state license, or a state and county license, or county license, as the case may be, shall have been procured. . . .

In 53 C. J. S. 556, §27, the author states that:

The terms "business," "occupation," or "trade," as used in a law imposing a license tax on businesses, occupations, trades, etc., ordinarily mean a business, occupation, or trade in a commercial sense carried on with a view to profit or livelihood, and embraces everything about which a person can be employed. . . . In the absence of a statute specifically so providing, the performance of a single act, or even a number of isolated acts, pertaining to a particular business or occupation does not constitute engaging in, or carrying on, such business or occupation within the meaning of a law imposing a license or tax thereon unless an intent to engage in the business is clearly apparent. . . .

To the same effect see also *Harper v. England*, 124 Fla. 296, 168 So. 403, text 406, and *Texas Co. v. Amos*, 77 Fla. 327, 81 So. 471, text 472.

Section 205.48, F. S., imposes a license tax upon persons engaged in the business of manufacturing, etc., but provides that no license is required thereunder where the manufacturing is incidental to and a part of some other business classification for which a license is required under some other section of the statutes. Section 205.59, F. S., imposes a license tax on those persons engaged in the business of trading, buying, bartering, serving, or selling tangible personal property as owner, agent, broker or otherwise. This section further provides that:

No license shall be required under this section, where the trading, buying, bartering, serving or selling of tangible personal property is a necessary incident of some other business classification for which an occupational license is required. . . .

under some other statute. A person using ice making machinery, without regard to the size or capacity thereof, for the purpose of producing ice in a broad sense is engaged in the manufacture of ice; and a person selling ice as a business is engaged in the business of selling tangible personal property. A person using ice machines for the purpose of manufacturing ice for commercial sale would be within the purview of §205.48, F. S.; and a person selling ice commercially would be within the purview of §205.59, F. S.

A person who manufactures ice under and pursuant to a license issued under §205.48, may sell his ice at either retail or wholesale without procuring a license under §205.59, such sale being incidental to and a part of his manufacturing business. Where the manufacture of ice is merely incidental to the operation of some other business subject to license and licensed under another statute then its manufacture may be incidental to the operation of such other business, and if so incidental no license under §205.48 would be required. Ice machines operated by a motel, restaurant, hotel, or other business, to supply ice in connection with the operation of such business, would seem to be incidental to such business, when ice is not sold commercially by the motel, restaurant, hotel or other business. Whether ice machines are used as an incident to another business, or as an independent business, is largely a question of fact to be determined from all attending circumstances.

Persons engaged in the manufacture of ice for commercial sale, through the use of ice manufacturing machines, are subject to an occupational license tax under §205.48, F. S., unless incidental to the operation of some other business duly licensed.

062-130—October 1, 1962

HIGHWAYS AND BRIDGES
TURNPIKE AUTHORITY—OPERATION OF RESTAURANTS—BIDS—AWARDING OF CONTRACTS—
CH. 340; §§340.04, 340.06, 340.12, F. S.

To: *John M. Hammer, Chairman, Florida State Turnpike Authority, Tampa*

QUESTIONS:

1. Is the turnpike authority required by law to accept the highest dollars and cents bid received for the operation of the restaurants on the turnpike?

2. Is it the duty of the turnpike authority to make a determination by the exercise of sound discretion as to who is the highest and best bidder?

3. Is the turnpike authority permitted to award the contract to a bidder who was not the highest bidder in dollars and cents but in the opinion of the authority is the highest and best bidder?

4. If the answer to question 3 is in the affirmative, must the turnpike authority reject all bids and readvertise before such an award could be made?

Chapter 340, F. S., is the statutory authority under which the turnpike authority functions. Your attention is directed to several specific sections of this chapter which have a bearing upon the questions submitted. In §340.04 F. S., under the title "Definitions," we find the following language:

(2) (b) The authority is specifically prohibited from granting concessions or selling any services or products along the projects except the sale of motor fuel with attendant towing and maintenance facilities and the sale of food with attendant nonalcoholic beverages.

In §340.06, entitled "General powers," the following language is used:

(13) To make and enter into all contracts and agree-

ments necessary or incidental to the performance of its duties and the execution of its powers under this chapter. When the cost under such contract or agreement, other than compensation for personal services, involves an expenditure of more than fifteen hundred dollars the authority shall make a written contract with the lowest and best bidder after advertisement for not less than two consecutive weeks in a newspaper of general circulation and in such other publications as the authority may determine. . . .

In §340.12, under the title "Revenues," we find the following language:

(1) The authority is hereby empowered to fix, revise, charge and collect tolls and charges for the use of each project and the different parts or sections thereof, to contract with any person, partnership, association or corporation desiring the use of any part thereof for the purpose of providing any of the facilities comprehended in the term "turnpike project" as defined herein, when, in the opinion of the authority, such facilities are necessary or desirable, and to fix the terms, conditions, rates and charges for use; provided, that facilities for motor fuel and food shall be publicly offered for the operation thereof under rules and regulations to be established by the authority. Such tolls shall not be subject to supervision or regulation by any other commission, board or agency of the state.

It is noted that the language used in the above section requires that the "authority," if it determines to award a concession to a food supplier located on the turnpike, that it publicly offer these concessions under rules and regulations to be established by the "authority."

In subsection (2) when the "authority" determines to award a concession for motor fuel requirements it specifically requires at least four weeks notice published in a newspaper having general circulation of the state before receiving sealed bids for proposal to provide this service. This four weeks required notice does not apply under the terms of the statute to the award of any food concession. Therefore, it can be concluded that the "authority" has deemed the notice as set forth in §340.06(13), F. S., of two consecutive weeks notice in a newspaper, to be adequate.

The same general principles which have been involved where public agencies make purchases under statutory provisions requiring advertisement and award to the "lowest responsible bidder" are involved in the questions raised in your letter. The only difference is that in awarding a concession your "authority" is primarily concerned with securing the highest and best bidder so as to insure the most revenue for the turnpike project.

As I view your operation, the "authority" is charged with the responsibility of complying with all statutory provisions which relate to the operation of the turnpike. In addition to these responsibilities, it is your obligation to protect the bondholders who have purchased the bonds and thus have made the project possible. Adequate revenues are required to amortize these bonds over the period of the life of the bonds. One of the sources of revenue of course consists of the concessions which serve food to the customers using the turnpike. The motoring public is en-

titled to expect quality food and service at reasonable costs provided for them in an atmosphere of pleasant surroundings. To properly insure these essential qualities, it is my judgment that the concessionaire shall possess some degree of experience in food service operation.

In AGO 051-371, dated Oct. 23, 1951, this office was called upon to answer the question as to whether a board of county commissioners has the right to exercise well founded discretion in determining who is the "lowest responsible bidder" on any basis other than the lowest dollar bid. This opinion, after stating that statutes which were being interpreted should be strictly construed, stated also that there is an area of sound discretion which is recognized as inherent in determining the "lowest responsible bidder." In support of this conclusion, the supreme court of Florida, in the case of *City of Pensacola v. Kirby*, 47 So. 2d 543, was quoted as follows:

While the law imposes no mandatory obligation upon a public agency in respect to the letting of competitive contracts that will require the agency in every state to consider the lowest dollars and cents bid as being "the lowest responsible bid" to the exclusion of all other pertinent factors that may be taken into consideration, the law does require that where discretion is vested in a public agency with respect to letting public contracts on a competitive basis, the discretion may not be exercised arbitrarily or capriciously but must be based upon facts reasonably tending to support the conclusions reached by such agency. See also *Culpepper v. Moore*, Fla., 40 So. 2d 366, and *Willis v. Hathaway*, 95 Fla. 608, 117 So. 89.

On the basis of this opinion and others which have been rendered by this office of a similar nature, it is my opinion in response to question 1 that if your "authority," in the exercise of its sound discretion, determines that the highest dollar and cents bid was not submitted by the highest responsible bidder then I think your "authority" should make certain that the material facts and reasons for rejecting the highest dollars and cents bid be clearly understood and be specifically documented and made available for public inspection and possible review by the courts. The burden is placed upon your "authority" to show that the discretion vested in your "authority" has been properly exercised and any concessions awarded by the "authority" must be clearly free of any taint of favoritism, fraud, collusion, arbitrariness or capriciousness. On the basis of the language used herein, it is my opinion that question 1 should be answered in the negative; that question 2 should be answered in the affirmative; that question 3 should be answered in the affirmative and that question 4 should be answered in the negative for the reason that in evaluating all proposals received the sound discretion of the "authority" should be exercised in the light of the language which has heretofore been set forth wherein the award be made in the best interest of the sound and businesslike operation of the turnpike project.

062-131—October 10, 1962

TAXATION

LICENSE TAXES—PROFESSIONAL SERVICE CORPORATIONS, MEMBERS AND EMPLOYEES—CHS. 621 AND 205, §§205.52, 205.01, 205.68, 621.05-621.09, 621.03, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Where a professional service corporation, existing under Ch. 621, F. S., engages in the furnishing of professional services for compensation, through its shareholders and employees, who is required to obtain occupational licenses and pay license taxes under Ch. 205, F. S.?

Every person engaged in the practice of any profession, whether or not such profession be regulated by law, shall pay a license tax of \$10 for the privilege of practicing, which license tax shall not relieve the person paying same from the payment of any license tax imposed on any business operated by him. This section shall include real estate brokers but no license shall be required of their salesmen. (Emphasis supplied.)

Section 205.01, F. S., provides that:

No person shall engage in or manage any business, profession or occupation, for which an occupational license tax is required . . . unless a state license, or a state and county license, or county license, as the case may be, shall have been procured from the tax collector of the county where the place of business may be located, or where the profession or occupation may be engaged in, . . . (Emphasis supplied).

Section 205.68, F. S., provides that whenever used in Ch. 205, F. S., the word "person" shall be "construed to mean either person, firm, partnership, corporation, association, executor, administrator, trustee, or other legal entity, whether singular or plural, masculine or feminine, as the context may require." These two sections of the Florida Statutes in effect provide that no person or corporation shall engage in or manage any business, profession or occupation, for which an occupational license is required, unless and until an occupational license under Ch. 205, F. S., shall have been obtained.

Chapter 621, F. S., provides for the incorporation of professional corporations, which are defined as corporations organized under said chapter "for the sole and specific purpose of rendering professional service and which has as its shareholders only individuals who themselves are duly licensed or otherwise legally authorized within this state to render the same professional service as the corporation." (§621.03, F. S.). "The term professional service means any type of personal service to the public which requires as a condition precedent to the rendering of such service the obtaining of a license or other legal authorization and which prior to . . ." Sept. 1, 1961, "and by reason of law could not be performed by a corporation." (§621.03, F. S.). Under this chapter

an individual or group of individuals duly licensed or otherwise legally authorized to render the same professional services within this state may organize and become a share-

holder or shareholders of a professional corporation for pecuniary profit under the provisions of chapter 608 for the sole and specific purpose of rendering the same and specific professional service. (Emphasis supplied.) (§621.05, F. S.).

Under §621.06, F. S., "no corporation organized and incorporated under . . ." Ch. 621, F. S., "may render professional services except through its officers, employees, and agents who are duly licensed or otherwise legally authorized to render such professional services within this state; . . ." with certain exceptions mentioned in said section. Section 621.07, F. S., provides that nothing contained in said Ch. 621 may be "interpreted to abolish, repeal, modify, restrict or limit the law now in effect in this state applicable to the professional relationship and liabilities between the person furnishing the professional services and the person receiving such professional service and to the standards for professional conduct." Under §621.08 of said statutes, no corporation organized under said Ch. 621 may engage in any business "other than the rendering of the professional services for which it was specifically incorporated; . . ." Under §621.09, F. S., no corporation organized under said Ch. 621 "may issue any of its capital stock to anyone other than an individual who is duly licensed or otherwise legally authorized to render the same specific professional services as those for which the corporation was incorporated."

The authorities divide corporations into corporations aggregate, that is corporations of more than one stockholder, and corporations sole, that is corporations of a single stockholder. (Reid v. Barry, 93 Fla. 849, 112 So. 846, text 859 and 860.) The type of corporations sole considered in Reid v. Barry, *supra*, usually relates to kings, bishops, parsons, vicars, church wardens, and some others (Reid v. Barry, *supra*.) Where a corporation is organized under Ch. 621, F. S., *by an individual* (see §621.05, F. S.), it takes on the features of a corporation sole; however different in purpose from the common law corporations sole discussed above. Shares of a shareholder may not be transferred except to another of a like profession. These corporations are limited to individuals rendering *professional services* as defined in §621.03(1), F. S. These corporations seem inseparable from their professional shareholders. Those of one professional group may not become members of a corporation formed by members of another professional group. There is a clear distinction between corporations organized under Ch. 621, F. S., and those organized under Ch. 608 of said statutes.

Blanchard v. State, 30 Fla. 223, 11 So. 785, was a proceeding in mandamus brought by the members of a law partnership against the tax collector and county judge of a county in Florida to require them to require only one occupational license (that is the partnership as such) instead of one for each partner. The circuit court issued a pre-emptory writ, which was reversed by the supreme court, which held that each member of a law partnership must procure an occupational license. This office, by its opinion 047-105 of March 24, 1948 (1947-1948 AGO 254), held that practicing members of an engineering corporation must themselves obtain occupational licenses. In 53 C. J. S. 659, §47, it is stated that "where the tax is imposed on the particular occupation, one who is engaged in such occupation is not relieved of liability by the fact that he is acting as agent of another . . ."

It is quite clear from the above and foregoing that the authorities make a distinction between a corporation organized to carry on a profession, and those organized to carry on an ordinary business as distinguished from a profession. It is also clear that where a profession is carried on through a firm or corporation, by professional people, that each professional member or employee must obtain an occupational license to follow that profession; although it may be carried on through an officer, member, agent or employee of the corporation. Members of the professional corporation, notwithstanding the incorporation under Ch. 621, F. S., are nevertheless "personally and fully liable and accountable for any negligent or wrongful acts or misconduct committed by him, or by any person under his direct supervision and control, while rendering professional service on behalf of the corporation to the person for which such professional services were being rendered." Under these circumstances we do not think that the legislature intended professional corporations to be deemed corporations subject to license taxes separate and distinct from their members. Doubtless, the reason for providing for professional corporations was the existence of certain provisions in the revenue laws of the U. S.

Occupational license taxes should be required of each member of the professional corporation, and from its professional employees, but not of the corporation itself, so long as it confines itself to the professions of its members.

062-132—October 11, 1962

**DEPARTMENT OF PUBLIC WELFARE
SALE AND CONVEYANCE OF REAL PROPERTY, DIS-
POSITION OF FUNDS—NEED FOR LEGISLATION
TO AUTHORIZE—CH. 409, §409.24, F. S.**

To: *William T. Basford, Jr., Attorney, State Department of
Public Welfare, Jacksonville*

QUESTION:

What authority does the department of public welfare have to sell and convey certain real property in Hillsborough county and apply the proceeds from the sale of same to departmental functions?

This is to advise that a search of Ch. 409, F. S., relating to the department of public welfare fails to reveal any authority, either expressed or implied, for the said department to sell or convey any real property that it may hold in its name.

Therefore, if the department cares to sell a particular piece of real property, it will be necessary for it to obtain either specific or general legislative authority. An amendment to §409.24, F. S., relating to the sale of personal property to include the sale of any real property would give general authority to sell any real property that the department may acquire in the future or may have acquired in the past. The said section should further be amended to include the appropriation to the department of any funds derived from the sale of such real property.

The foregoing conclusion is based on the assumption that the will, under which the department received the property, did not contain a power of sale and the fact that an administrative state agency, such as the department of public welfare, has only the authority that is conferred on it by law. It may make

for the government it represents only such contracts and perform such duties as are authorized by law.

I trust the foregoing answers your inquiry.

062-133—October 12, 1962

PUBLIC WELFARE

STATE DEPARTMENT—SINGLE AGENCY TO ADMINISTER
PUBLIC WELFARE—COMBINED OR SINGLE STATE
PLAN FOR OBTAINING FUNDS—§§409.02, 409.21,
409.33, 409.40, 409.44, CH. 409, F. S.

To: *Frank M. Craft, State Director, Department of Public Welfare, Jacksonville*

QUESTION:

Is the state department of public welfare the single agency of the state designated by law to administer such welfare programs as old age assistance, aid to the blind, aid to the permanently and totally disabled, and as such single agency may it prepare and submit to the proper federal agency one single state plan which shall provide for and include each of the aforesaid categories of welfare assistance; the single plan which shall replace the three separate plans under titles I, X and XIV, shall be for the purpose of obtaining additional federal funds under public law 87-543 (title XVI)?

Title 42 U.S.C.A., Ch. 7, §302 (p. 199) relating to state plans for old age assistance; §1202 (p. 433) relating to the state plans for aid to the blind and §1352 (p. 455) relating to aid to the permanently and totally disabled provides, among other things, for the establishment of single state agencies to administer or supervise the administration of the respective plans, which permits each category of assistance to be administered by either separate state agencies or all of them by one state agency.

Public law 87-543, which was enacted by the 87th congress and became law July 25, 1962, provides in part "D" (§141) for a new title to be added to the social security act (title XVI), which permits states, if they choose, to file a single or combined plan for old age assistance, aid to the blind, aid to the totally and permanently disabled and medical assistance to the aged.

In other words, in states having different agencies to administer the separate programs, certain financial advantages are offered to those states as an incentive to encourage a centralization of the administration of the separate plans under one single agency, such as we have in Florida, in that the programs in which this state participates are administered by the state department of public welfare.

The fiscal advantages to the states operating under the single or combined plan are as follows:

1. By combining the three programs (old age assistance, aid to the blind and aid to the permanently and totally disabled) into a single plan will enable states to average together their assistance payments for the aged, blind and disabled. For example, under the 1960 and 1961 federal law each program is averaged separately and if the state's average payment for old age assistance exceeds the federal maximum, the state receives no federal funds with respect to expenditures above the maximum, even though in another assistance

program, the average state expenditure may be below the specified matching maximum. States which now may choose to combine their programs under the terms of the new title XVI, supra, will be able to average the expenditures among the categories.

A state that has a separate agency for administering aid to the blind would not be able to include the payments under such a separate program in the averaging of payments aforesaid. (See state letter 582, dated Aug. 20, 1962, pp. M1-5 from the U. S. department of health education and welfare to state agencies administering approved public assistance plans on the subject; interpretation of public welfare amendments of 1962, public law 87-543.)

2. More favorable medical matching for the blind and the permanently and totally disabled by permitting states, which select the single plan, to become eligible for federal matching for medical care for recipients of aid to the blind and the disabled on the same basis as they are now, available for recipients of old age assistance that is up to \$15 a month to recipients for vendor medical care. *(Such additional medical care advantage would be available to states that have a separate state agency which administers the program of aid to the blind and may submit a separate blind aid program.)* (See state letter 582, supra.)

It may also be pointed out that if a state does not administer one or more of these programs, such program does not have to be established in order to have a combined plan. (See pp. 1570, 1584 and 1585 of U. S. code, congressional and administrative news 11, June 30, 1962 to July 26, 1962 under legislative history for analysis of public law 87-543.)

Chapter 409, F. S., which creates the state department of public welfare for the purpose of administering public assistance and related welfare programs provides in §409.02 thereof that the department shall conduct, supervise and administer, or cause to be administered, within the state all social welfare and relief work which is or will be carried on by the use of federal or state funds; that the department may act as agent of the federal government, state government or any county or municipal government in the conduct and administration of public aid and social welfare activities and in the disbursement of funds received from the federal government, state government, or any county or municipal government for public aid and social welfare purposes within the state. Social welfare is defined in the section to include aid to dependent children, mothers aid, old age relief, aid to the sick, blind, indigent, unemployed and similar unfortunates. Sections 409.40 and 409.44 include aid to the permanently and totally disabled and medical (drug) program for recipients of public assistance, respectively.

Chapter 409 also provides that the department may take such action as may be necessary to secure the benefits of any public aid or assistance of any character as may be available from the federal government or any agency thereof which is not inconsistent with the constitution and laws of this state; that it shall cooperate fully with the U. S. government, its agencies and instrumentalities to the end that the department may receive the benefits of all federal financial allotments and assistance possible to carry out the purposes of the law, which shall be liberally construed (§§409.02, 409.21 and 409.33).

It is also my understanding that this matter has been discussed with Mr. Wallace Henderson of the office of the budget director of the state and he stated that the budget director has no

objection to the submission of a single state plan instead of three separate state plans by the department of public welfare, *inasmuch as the funds to administer the programs will continue to be released, used and accounted for as set up in the appropriations act and in keeping with the budgetary practices of this state.*

In view of the foregoing it is my opinion that the state department of public welfare is the single agency of the state that has been designated by Ch. 409, supra, to administer the welfare program, including but not limited to, old age assistance, aid to the blind, aid to the permanently and totally disabled and as such single agency, *it may prepare and submit to the proper federal agency, for the purpose of obtaining federal funds, one combined or single state plan which shall provide for each of the aforesaid categories of welfare assistance.*

062-134—October 17, 1962

TAXATION

TAX EQUALIZATION—POWERS AND DUTIES OF BOARD OF EQUALIZATION—§§193.25, 193.27, 192.21, CH. 475, F.S.; §1, ART. IX, STATE CONST.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. May county boards of tax equalization in this state employ property appraisers to assist them in carrying out their duties as tax equalizers?

2. May such appraisers be employed without the approval or consent of the county assessor of taxes?

3. Must such appraisers be duly licensed land appraisers under Ch. 475, F.S.?

Under §193.25, F.S.,

The county assessors of taxes shall complete the assessment rolls of their respective counties on or before the first Monday in July in every year, on which day such assessors shall meet with the board of county commissioners at the clerk's office of their respective counties for the purpose of hearing complaints and receiving testimony as to the value of any property, real or personal, as fixed by the county assessor of taxes, of perfecting, reviewing and equalizing the assessment, . . .

Such county boards hold their said meetings for the purpose "of hearing complaints and receiving testimony as to the value of any property, real or personal, as fixed and assessed by the county assessor of taxes, . . ." Under §193.27, F. S.,

The board of county commissioners may equalize the assessment of the real estate or personal property in their respective counties, and for that purpose may raise or lower the value fixed by the county assessor of taxes on any particular piece of real estate, or item or items of personal property.

Under the above statutes the board of tax equalization has no authority to make assessment, independently of the assessments made by the tax assessor, but is limited to the raising or lowering of specific assessments made by the county assessor of taxes that are out of line with those made by the assessor of taxes generally. The said board's authority is to correct errors of commission or

omission made by the county assessor of taxes; not to make a general revision of the valuations made by the assessor of taxes, but to equalize and correct those valuations out of line with the valuations generally as made by the assessor of taxes. In this connection, where complaint is made as to an assessment and valuation, the board of equalization may hear complaints and receive testimony concerning the proper valuation for the property, and in this connection may perfect, review and equalize the valuations fixed by the assessor when out of line with assessments generally. When equalizing the valuations made by the assessor of taxes, the board of equalization may raise or lower valuation in order to produce a fair and equal valuation.

The boards of tax equalization should equalize from the testimony offered before them, including that offered by both the owner and other persons complaining, as well as from personal observation when deemed necessary or advisable. From 3 Cooley on Taxation, 4th Ed., 2389, §1194, we find that tax equalization, such as that provided by said §§193.25 and 193.27, F. S., consists of the "review of an assessment on particular property, *where it is claimed that it is not taxable property*, or that it has been over-valued or under-valued or that the assessment is otherwise invalid." Such tax equalization boards are agencies "established to carry into effect the general rule of equality and uniformity of taxation required by constitutional or statutory provisions." (84 C. J. S. 979, §512). Their main purpose is review and correction of tax assessments made by the county assessor of taxes. Such boards have no power or authority to make blanket increases or decreases, but only to equalize (*Armstrong v. State*, Fla., 69 So. 2d 319, text 321 and 322). In this connection see also *Sanders v. Crapps*, Fla., 45 So. 2d 484, and *Hoffman v. Land*, Fla., 55 So. 2d 806.

Section 193.25, F. S., requires that county assessors of taxes in this state complete their assessment rolls on or before the first Monday in July of each year "on which day such assessors shall meet with the board of county commissioners . . . for the purpose of hearing complaints and receiving testimony as to the value of any property, real or personal, as fixed by the county assessor of taxes, of perfecting, reviewing and equalizing the assessment, and may continue in session for that purpose from day to day for one week, or as long as shall be necessary. . . . Should the board increase the value fixed by the county assessor of taxes of any real estate or personal property, due notice thereof shall be given to the owner or agent of such property. . . ." Under §193.27, F. S., "the board of county commissioners may equalize the assessment of the real estate or personal property in their respective counties, and for that purpose may raise or lower the value fixed by the county assessor of taxes on any particular piece of real estate, or item or items of personal property" The above statutes have been held to "grant to the board of county commissioners the power and authority to equalize tax assessments made by the county tax assessor." (*Sanders v. Crapps*, Fla., 45 So. 2d 484, text 488). "The authority of the county commissioners is to equalize assessments as made by the tax assessor." (*Cooley v. Johnson*, 95 Fla. 946, 117 So. 111).

In *Sparkman v. State*, 71 Fla. 210, 71 So. 34, text 41, the court remarked that "county commissioners have no general power in making tax assessments but only such special and limited power as is specifically conferred by statute to secure equalization of tax values." Since the opinions in the *Sparkman* case (1916) and the

assessment of the taxes involved in *Cooey v. Johnson* (1924), Ch. 10040, 1925, was adopted, providing that "no act of omission or commission on the part of any tax assessor, or any assistant tax assessor, or any tax collector, or any board of county commissioners . . . shall operate to defeat the payment" of any ad valorem taxes assessed, "but any such acts of omission or commission may be corrected at any time by the officer or party responsible for the same in like manner as is now or may hereafter be provided by law for performing such acts in the first place. . . ." This provision now appears as a part of §192.21, F. S. "The presumption is that the board of equalization would have corrected the valuations, if excessive, had such application been made." (*Tampa v. Palmer*, 89 Fla. 514, 105 So. 115, text 121).

Section 1, Art. IX, State Const., requires that the legislature "prescribe such regulations as shall secure a just valuation of all property, both real and personal. . . ." In *Sparkman v. State*, supra, it was held that "just valuation" as required by the constitution was not secured when the valuation of some property is higher proportionately than valuation of other property assessed for the same purpose. Under §193.27, F. S., county boards of equalization for the purposes of equalization "may raise or lower the value fixed by the county assessor of taxes on any particular piece of real estate or item or items of personal property."

From the above and foregoing we reach the following conclusions as to the above stated questions:

1. County boards of tax equalization when making equalization between parcels of real estate or items of personal property, when unable to determine the full cash value of such property for purposes of tax equalization, may incur reasonable expense by employing the assistance of duly qualified appraisers to assist them in determining the value of such property. Only when an objection is filed to tax valuations, directly or indirectly involving the parcel of lands brought into question, may such assistance be obtained. The county board of equalization has no assessment powers; it has only powers of equalization of values as between taxable properties.

2. Such appraisers, when they are to be employed within the above rule, may be employed without the approval or consent of the county assessor of taxes.

3. Such appraisers should be duly licensed land appraisers under Ch. 475, F. S. However, this answer should not be construed as prohibiting the boards of tax equalization hearing the evidence of qualified persons on the question of the valuation of a parcel of land or item of personal property; this rule is intended to follow the rule of who may testify to the valuation of property in court.

062-135—October 17, 1962

PRACTICE OF MEDICINE

APPLICATION FOR LICENSE TO PRACTICE—EFFECT OF
PARDON OF FELONY CONVICTION; DISCRETION OF
BOARD OF EXAMINERS—§458.12, F. S.

To: *Dr. Homer L. Pearson, Director, Florida State Board
of Medical Examiners, Miami*

QUESTIONS:

1. Has the felony conviction of an applicant for a medical license been erased by presidential pardon?

2. Can the state board of medical examiners consider a previous felony conviction of an applicant for a license, even though the applicant has been subsequently pardoned for the offense?

Factually, it appears that an applicant for a medical license was convicted in a federal court for concealing assets in violation of the national bankruptcy act. It further appears that the applicant's license to practice medicine in a sister state was revoked by the proper authorities on the grounds of malpractice and gross immorality. The applicant subsequently served for a period of less than one year in the armed forces of the U. S., from which he was honorably discharged.

AS TO QUESTION ONE:

On Dec. 24, 1945, by presidential proclamation 2676, general amnesty was conferred upon persons convicted of federal offenses who served in the armed forces of the U.S. for not less than one year on or after July 29, 1941, provided such persons were honorably discharged.

Since it appears that the applicant served in the armed forces of the U.S. for a period of less than one year, the general amnesty conferred by the above proclamation does not extend to him. Moreover, amnesty under the above proclamation served only to pardon those persons convicted of "federal offenses" and therefore would have no effect upon the license revocation of this individual from the sister state. Therefore, your question is answered in the negative.

AS TO QUESTION TWO:

While a pardon exempts an individual from punishment and the legal consequences of a conviction, the Florida supreme court had occasion to state in *Fields v. State, Fla.*, 85 So. 2d 609, 610:

... a pardon does not preclude consideration of a criminal conviction in disbarment proceedings, or as grounds for the discretionary ruling of a board empowered to revoke professional licenses. . . .

The statement above quoted is sustained by the decision of the Florida supreme court in *Page v. Watson*, 140 Fla. 536, 192 So. 205, 126 A.L.R. 249; and *State v. Snyder*, 136 Fla. 875, 187 So. 381. See also *Branch v. State*, 120 Fla. 666, 163 So. 48. In *Page v. Watson*, supra, the Florida state board of medical examiners sought to inquire into the right of a physician who had been convicted of a felony to continue to hold his license even though his civil rights had been restored by full pardon. *State v. Snyder*, supra, concerned a license revocation of an attorney who had been pardoned for a felony conviction. In each of the cited cases, the state's right to inquire into the individual's continuing privilege to hold a license was sustained by the Florida supreme court as against the contention of the licensees that full pardon had obliterated all such inquiry. In *Page v. Watson*, 192 So. 205, 211, the court also observed:

The pardon restored petitioner's rights of citizenship, but it did not restore or affect his qualifications or his character, or exempt him from the enforcement of the statute authorizing his license to practice medicine to be "revoked, suspended, or annulled, or such practitioner reprimanded upon . . . grounds" stated in the statute.

This office has previously advised (1951-52 AGO 051-180, p.

575) that §458.12 F.S., vests the state board of medical examiners with discretion as to the revocation, suspension, or annulment of a license to practice of a physician convicted of a felony. Since the state board of medical examiners has the power to suspend, annul, or revoke the license of a practitioner for the conviction of a felony, even after full pardon (*Page v. Watson*, supra), by a parity of reason, it would likewise appear that the medical board has discretion to consider the felony conviction of an applicant for license, even though such applicant had been pardoned for the offense. Your question therefore is answered in the affirmative.

062-136—October 17, 1962

COUNTY ORGANIZATION, OFFICERS AND REGULATIONS
COUNTY OPERATION BUDGET—DUTIES OF BOARD OF
COUNTY COMMISSIONERS TO ADOPT—§§129.01, 129.03-
 129.06, 193.25, 193.27, 200.11, 200.19, 230.23, CH. 129,
 F. S.; §15, ART. IV, STATE CONST.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

May a board of county commissioners in this state operate the county without a final annual budget prepared and adopted in accordance with Ch. 129, F.S.?

Your said request for opinion states that the tax roll of Hernando county, having been duly prepared by the county assessor of taxes for said county, was during July, 1962, duly presented to the board of county commissioners of said county, as a board of tax equalization, for examination and equalization by the said county board under and pursuant to §§193.25 and 193.27, F.S., as to real property, and under §§200.11 and 200.19, F.S. You state that as of Sept. 24, 1962, no equalization under said section had been made by the board of county commissioners; and so far as we are advised no such equalization has yet been made by the said county board.

Under §129.05, F. S.,

After the equalization of the tax roll and the certification of the valuations by the assessor of taxes, and after the final adoption of the budget for each fund, the board (of county commissioners) shall proceed to fix the millage rate for each fund as provided by law. The board shall determine the millage to be levied for each fund by dividing the applicable assessed valuation into an amount, 95% of which is the amount budgeted to be received from taxes, using the nearest one-quarter of a mill or other fraction or decimal ordinarily used in the county.

Under §129.06, F.S.,

(1) Upon the final adoption of the budgets as provided in this chapter, the budgets so adopted shall regulate the expenditures of the county and district, and the itemized estimates of expenditures shall have the effect of fixed appropriations and shall not be amended or altered or exceeded except as provided in this chapter.

(a) All expenses incurred in the fiscal year for which the budget is made shall be vouchered and charged on the financial records against the budget of that fiscal year, . . . Under these statutes no expenditures may be legally made by

the county unless and until a legal budget for the current fiscal year (Oct. 1, 1962, to Sept. 30, 1963) shall have been duly made and adopted.

The failure of a board of county commissioners for probably two or more months to hold an equalization meeting and equalize the tax roll, thereby delaying the preparation for a legal county operating budget prior to the beginning of the county fiscal year on Oct. 1 of the fiscal year, suggests nonfeasance, if not actual misfeasance or malfeasance on the part of some person or persons. There may have been malfeasance, misfeasance or neglect of duty in office, resulting in the county being without a lawful budget at the beginning of the fiscal year, within the purview of §15, Art. IV, State Constitution, if the delay cannot be duly and legally justified.

The several boards of county commissioners in this state are required, by §129.01, F. S., to adopt county annual budgets for their counties. Under §129.04, F. S., county fiscal years begin on Oct. 1 of each year and end on the next ensuing Sept. 30. Under these statutes annual county budgets must provide for a general fund, a road and bridge fund, a fine and forfeiture fund, a capital outlay reserve fund, a bond interest and sinking fund, special district operating funds, and such other funds as may be provided by law. Under §230.23, F. S., county school budgets are required to be made by the county boards of education of the state, providing funds for operating the county school system. Under §129.03, F. S., the county assessor of taxes, on or before July 1 of each year, is required to

certify to the county auditor (clerk of the circuit court) his estimate of the total valuations against which taxes may be levied, reasonably to be expected by him to be spread upon the general tax roll of the current year, separately of homestead real property and of non-homestead property in the entire county and in each district in the county in which taxes are authorized by law to be levied by the board of county commissioners for funds under its control.

Provision is made in this section for corrections by the tax assessor of errors made by him, amounting to 10% or more.

Section 129.03 (1) (b), F. S., provides that:

Immediately upon the equalization of the tax roll by the board of county commissioners, the assessor of taxes shall certify to the board of county commissioners the actual assessed valuation of property, as prescribed above, in each district and in the entire county.

Paragraph (c) of said subsection and section, provides that:

In preparing the budget, the latest figure so certified shall be used as the basis for estimating the taxes to be levied, and the millage rate required to be levied, based on the latest figure thus certified and calculated, . . .

These statutory provisions contemplate the preparation of a tentative county budget, based on the tentative figures furnished by the county assessor of taxes under §129.03 (1), F. S., and final county budget after the millages have been ascertained and fixed through the use of the equalized and final assessment valuations. These rules are substantially the same as those applying to the county board of education.

We must, therefore, hold that no legal county budget may be

made and become final until after the tax valuations have become final and the final millages have been ascertained and fixed. Until there is a legal final county budget duly made and adopted for each and every fiscal year, no county expenditures are authorized. This being true, expenditures made from county funds prior to the making of the final budget would seem to be illegal and unauthorized.

062-137—October 17, 1962

PUBLIC HEALTH

PLUMBING—INTERRELATION OF REGULATIONS OF STATE BOARD OF HEALTH AND BOARD OF COUNTY COMMISSIONERS—CHS. 29437, 1953; 59-1576; 61-2503, LAWS OF FLORIDA; CHS. 381 AND 553, §§381.031, 381.071, 381.281, 553.05-553.07, 553.09, F. S.; §1, ART. III; §§1, 2, ART. XV, STATE CONST.—STATE SANITARY CODE

To: Bjarne B. Andersen, Jr., Staff Attorney, Florida State Board of Health, Jacksonville

STATEMENT OF FACTS:

The legislature of Florida enacted Chs. 59-1576 and 61-2503, special acts for Monroe county, which substantially grant to the board of county commissioners the authority to adopt zoning and building regulations *in the territory within the county which is not included in the corporate limits of any city or town*, such regulations and restrictions to be made in accordance with, among other things, a comprehensive plan and design to promote health and the general welfare, to facilitate the adequate provisions of water, sewerage and other public requirements. The acts further gave the *board of county commissioners the authority to adopt, change and enforce electrical, plumbing and building codes and to employ inspectors of such building, electrical and plumbing works for which permits may be issued*. The said board is also authorized and empowered to fix reasonable permit and inspection fees to be charged by the county, for such permits, inspections, etc., that the board may determine to be necessary in the administration of the chapter.

Pursuant to the authority and the procedure set forth in said Ch. 59-1576, the board of county commissioners of Monroe county adopted resolution P-1. (Although we do not have, nor were we furnished a copy of resolution P-1, it would appear from p. 1 of resolution P-2, which accompanied your letter, that resolution P-1 provided for a plumbing code for the said areas of the county by adopting certain chapters of the Florida sanitary code, relating to plumbing, provided for the enforcement of the resolution and designated it the plumbing code for Monroe county.)

The 1961 legislature enacted Ch. 61-2503, which had substantially the same provisions as Ch. 59-1576, *supra*, except to provide for the appointment of a zoning board and to prescribe its powers and duties.

Chapter 61-2503 repealed Ch. 59-1576, but provided in

§16 thereof that, "All actions taken by the board of county commissioners heretofore under chapter 59-1576, Laws of Florida, are hereby validated, ratified and approved."

From the aforesaid document entitled, "Resolution P-2," which accompanied your letter of inquiry, it appears that on or about July 10, 1962, the board of county commissioners of Monroe county saw fit to adopt a new plumbing code, which contained substantially the same provisions as resolution P-1 with the exception of certain provisions relating to the approval issuance of septic tank and/or drainfield permits. From a reading of resolution P-2 and without the benefit of resolution P-1 aforesaid, which was approved in the 1961 act, *supra*, it would appear that the controversy that has now arisen between the Florida state board of health and the board of county commissioners of Monroe county, is due to the elimination from the plumbing code for Monroe county of §§10, 12 and 13 of Ch. 5 of the Florida sanitary code.

The aforesaid sections of Ch. 5 of the Florida sanitary code provide substantially as follows:

Require plans and specifications for septic tanks of over 1200-gallon capacity to be approved by the Florida state board of health, and provide for a permit to be obtained from either the full time local health unit (county), a full time city health department or the Florida state board of health. Final inspection is required to be made by the agency issuing the permit.

Section 5(c) of resolution P-2 provides substantially that prior to the construction or installation of any septic tank or drainfield, the plans, drawings and specifications for same shall be approved by a duly appointed plumbing inspector for Monroe county and a permit issued after approval has been obtained from the zoning department, "that the approval and issuance of such permit by a plumbing inspector and the zoning department is in lieu of the requirements of §§10, 12 and 13 of Ch. V of the state sanitary code which requires that the approval of the plans and specifications for septic tanks and the issuance of construction permits for septic tanks and/or drainfields by the Florida state board of health or a full time local county healthman." Final inspection is provided for in substantially the same language as that in Ch. V, §13, *supra*, except that such inspection shall be made by a plumbing inspector of Monroe county.

QUESTION:

Can a board of county commissioners legally adopt a regulation (as a part of its plumbing code), which requires the approval of plans and specifications for a septic tank or drainfield and the issuance of a permit for the contraction and installation thereof by designated administrative officials of the county, in lieu of the plans being approved and the permit issued by the state board of health as required by Ch. V, §§10, 12 and 13 of its rules and regulations?

Sections 1 and 2, Art. XV, State Const., authorize the establishment of a state board of health by the legislature and when

established such board has "supervision of all matters relating to public health with such duties, powers, and responsibilities as may be prescribed by law."

Chapter 381, F. S., created the Florida state board of health and invested in it general supervision of public health and sanitation in this state.

Section 381.031, F. S., relating to the duties and powers of the board, gives it the authority to adopt, promulgate, repeal and amend rules and regulations *consistent with law* regulating, among other things, sanitation practices relating to the disposal of excreta, sewage or other wastes and plumbing. Such rules and regulations are known and designated as the sanitary code of the state.

The board shall consult with and advise any county or municipal authority as to the disposal of drainage, sewage or refuse. (§381.281).

Section 381.071 provides as follows:

The provisions of the rules and regulations adopted and promulgated by the board under the provisions of this chapter shall, as to matters of public health, supersede all regulations enacted by other state departments, boards or commissions, or ordinances and regulations enacted by municipalities; . . .

Pursuant to the aforesaid authority, the state board of health adopted Ch. V to provide a minimum requirement for individual sewage disposal and Ch. VIII relating to plumbing; said chapters are a part of the said sanitary code, both of which are a part of the plumbing code for Monroe county, except for §§10, 12 and 13 of Ch. V, *supra*.

In rendering assistance to the two agencies in this matter we must take into consideration the authority delegated by general as well as by special acts.

Chapter 553, F. S. (Ch. 26904, 1951), cited as the Florida plumbing control act (and relates to Monroe county, especially the unincorporated areas), provides in §553.06 that Ch. VIII of the Florida state sanitary code of the Florida state board of health is adopted as the state plumbing code and that all installations, repairs and alterations to plumbing shall be performed in accordance with its provisions.

Chapter VIII of the said sanitary code substantially provides for its administration to be invested in an administrative authority defined in the code as follows:

The administrative authority is the individual official board, department, or agency established and authorized by the state, county, city, or other political subdivision created by law to administer and enforce the provisions of this plumbing code and amendments thereto.

Apparently the said chapter also provides for the approval of plans and all tests and inspections to be done by the administrative authority. (See definition of approval, §1, and inspection, tests, and maintenance, §14.)

Chapter 553 provides, in §553.05, relating to county plumbing inspectors, among other things, that each county in this state acting through its board of county commissioners may employ one or more plumbing inspectors to inspect all plumbing installed within such county (except within the corporate limits of cities of 7500 or more population), to determine if all the minimum requirements of the

state plumbing code and the laws of the state, in regard to plumbing, have been complied with.

Section 553.07 relates to plumbing permits, inspection fees, and provides, among other things, that the board of county commissioners of each county, except within the corporate limits of certain cities and towns, may charge and collect a reasonable fee for the cost of inspection and for each plumbing permit issued for each building, and "the permit shall be issued in triplicate . . . one copy to be retained by the issuing officer who should be the plumbing inspector. . . ." (Emphasis supplied.)

Section 553.05 provides that the "plumbing inspector (employed by board of county commissioners) shall be under the direct supervision of the board of county commissioners. . . . In counties having county health units, it would be desirable to have inspectors work in cooperation with such units." (Emphasis supplied.)

The board, the state health officer, and local health authorities are charged with the enforcement of the said sanitary code. County plumbing inspectors are also charged with the enforcement of Ch. VIII of the code in counties such as Monroe. (See Ch. 553, F. S.)

As to the authority of the legislature to delegate to counties and cities of the state the authority to regulate the sewerage and plumbing in their area, we will take a brief look at some other special acts and what the courts have had to say about them.

In Ch. 29437, 1953, the legislature delegated to the board of county commissioners of Pinellas county, the authority to supervise and control the methods and means of providing for disposal of drainage, sewage, refuse . . . and the treatment of sewage outside the corporate limits of any municipality of Pinellas county.

In construing the special act (Ch. 29437, supra, in *Colen v. Sunhaven Homes Inc.*, 98 So. 2d 501), our court said that, "Counties occupy a position analogous to that of municipalities, being limited to and dependent upon legislative enactment as the basis for their authority."

Public authorities in municipalities have a duty to protect the safety, health and general welfare of citizens and such duty involves sanitary and health regulations, number of septic tanks in a given area, sewage disposal and many other activities.

In *State v. City of Miami*, 27 So. 2d 118, relative to Ch. 23407, 1945, our court said, "A city may use all reasonable means to protect public health."

In *State v. City of Daytona Beach*, 34 So. 2d 309 (See Ch. 23240, 1945), the court said:

The city of Daytona Beach may exercise all reasonable means to protect the health and morals of its people and is usually the sole judge of the means to be employed.

In *Buchanan v. City of Miami*, 49 So. 2d 337 (an action against the city of Miami challenging the validity of an ordinance imposing a charge upon the user of the sanitary system), the court said, "The construction and operation of a sewage disposal system is a governmental function."

The treatment of sewage so that it will not contaminate waters on which a city is located, and so that the health of the city as a whole would be protected, was just grounds for imposition by city ordinance. . . .

The court continued:

Of course, we are not primarily concerned with the wisdom of the plan, but simply give this short statement of the purpose of the municipal law-making body. . . .

(See *Melton v. City of Winter Haven*, 163 So. 526; *Herbert v. City of Daytona*, 163 565; *Boykin v. Town of River Junction*, 164 So. 558; *Atwater v. City of Sarasota*, 38 So. 2d 68; *Broward County Rubbish Con. Ass'n v. Broward County*, 112 So. 2d 898; also AGO 047-382 and 041-597.)

In view of the foregoing (which are only a few of the numerous cases interpreting legislative acts, ordinances and regulations adopted pursuant thereto relating to sanitation and to other matters relating to public health), it must be recognized that while the state board of health has a general and a local duty to provide supervision and assistance to protect the health of the people of our state, that a duty also rests upon the counties and municipalities, respectively. Although the county government has a responsibility toward all the people of the county, it would appear that in the absence of a municipal corporation to provide for the people such as in the unincorporated areas that the duty of the county becomes more highly magnified.

Although a diligent search has been made to find some judicial interpretation as to the validity of any legislative act or regulation adopted pursuant thereto, which may be in conflict with any provision of the rules and regulations of the state board of health, we have failed to find anything directly in point; yet there are two cases which we would like to call your attention to:

City of Hollywood v. Blair, 93 So. 2d 60, which was an action brought for the purpose of declaring invalid an ordinance, which authorized the *city of Hollywood* to issue "a permit to a licensed person to install septic tanks" and to make connections to the city sewer system. (Although we have not examined this ordinance, it would appear to be in conflict with §13, Ch. V, Florida sanitary code.

In reversing the lower court and holding the ordinance valid, the supreme court of Florida said:

The chancellor concluded that §553.12; F. S. 1955, and F.S.A., pertaining to the exclusion of certain counties from its operation having been amended in 1955 to provide for exclusion "according to the last official census," and the special census having been declared an official one, Broward county, in which Hollywood is situated, therefore, came under the act which is called "Florida plumbing control act of 1951" F.S.A. §553.01 et seq., and the definition of plumbing appearing in that act applied, so the septic tank contractors were engaged in plumbing without qualifying as plumbers. And the chancellor further applied the sanitary code adopted in accordance with Ch. 381, F. S. 1953, and F.S.A., because of the provision in §553.06, that "Chapter VIII of the Florida state sanitary code . . . is hereby adopted as the state plumbing code and all installations . . . to plumbing shall . . . be performed in accordance with its provisions."

So, by linking the relevant provisions of Chs. 381, 469 and 553, supra, he came to the view that what the septic tank contractors were doing was plumbing which they, qualified only to work with septic tanks, could not lawfully do. But when we examine Ch. VIII, supra, we find only

definitions and we discover no regulation with reference to the manner in which plumbing shall be done or the qualifications of those who may do it.

From the record before us, we do not know whether any rules have been adopted under §381.031(1) (g), F. S. 1955, and F.S.A., that would supersede "ordinances enacted by municipalities," §381.071, F. S. 1955, and F.S.A., on the qualifications of plumbers, so it seems we get no assistance from Ch. 381 in deciding this litigation. As we have said, the route to Ch. 381 lay through Ch. 553 and the applicability of that chapter must depend upon the effect of Ch. 29633, . . .

We note in §469.04, F. S. 1953, and F.S.A., that those engaging in plumbing are classified as master plumbers and journeyman plumbers. Both classes, as well as the persons installing septic tanks, doubtless perform work that constitutes plumbing under the broad, general understanding of that word. To repeat, all are examined before being permitted to engage in the work, and the work of all is supervised by the city.

It seems to us that the city may recognize all three under the power granted by §469.05, *supra*, and that it would not be logical to hold that the septic tank installers should be isolated, that the work done by them should be declared plumbing, and that they, therefore, should be prevented from making the connections under the limitations of the ordinance.

Logan v. Childs, 41 So. 197. This is a case wherein a city ordinance of the city of Bartow, which provided, among other things, for the location and construction of a cesspool, was attacked on the grounds that it was in conflict with Ch. 4346, 1895. In its opinion the court said:

We find nothing in §2, c. 4346, p. 113, of the laws of 1895, in conflict with the ordinance, nor in the general supervision and duties therein cast upon the state health officer. There is much in that statute that is difficult if not impossible of comprehension, but if it be that the legislature could, and has therein conferred upon the health officer power to override municipal ordinances upon matters relating to the health of its citizens, it has not undertaken to take away all the power theretofore conferred upon municipalities found in §677 of the revised statutes of 1892, . . .

There is an entire absence of proof by way of expert testimony or otherwise, should such testimony be admissible in this proceeding, to show the ordinance offensive and unreasonable, and as our judicial knowledge upon the question of sanitation, as to which those learned in such matters differ, is necessarily limited, we do not feel disposed to interpose our opinion as against that of those who are by law intrusted therewith.

Apparently, the Florida legislature also recognized the difficulty in interpreting the state sanitary code as evidenced by the enactment of §553.09, F. S., which provides for an advisory council on uniform interpretation to give advice and opinions on the construction and interpretation of the state plumbing code (which is Ch. 8 of the state sanitary code).

I also desire to quote certain portions of an opinion dated July 27, 1907, to Hon. E. M. Hendry, president, Florida state board of health, by my predecessor in office, Hon. W. H. Ellis, who later served as a justice of the Florida supreme court. This language is as follows:

I realize that the questions submitted to me involving the powers of the state board of health are of great public importance. . . .

. . . The constitution provides, Art. XV, §2, that: "The state board of health shall have supervision of all matters relating to public health, with such duties, powers and responsibilities as may be prescribed by law." The word "*supervision*" in the above quoted section of the constitution does not in my opinion conflict in the slightest degree with §1, Art. III of the constitution, by which the legislative authority of a state is vested in a senate and a house of representatives.

It was not the purpose of the framers of the constitution, by vesting in a state board of health the supervision of all matters relating to public health, to vest in that board the power of declaring what the law shall be with regard to measures affecting the public health; there was no intention on their part to divide legislative authority upon this subject between the legislature and the state board of health. . . .

Like other governmental agencies, therefore, the state board of health has and may exercise only such powers as may have been given to it by express legislative enactment or necessary implication. . . . (Emphasis supplied.)

* * *

Boards of health cannot, by the operation of their rules and regulations, enlarge or vary the powers conferred upon them by the legislature; the rules and regulations must be clearly within the scope of the purpose for which the board was created; in such case they have the force and effect of law.

Therefore, the answer to your question must turn upon the nature of the legislative delegation of authority, both in the general statutes and the special acts applicable to the subject of your inquiry.

The apparent purpose of Ch. 61-2503, *supra*, is to give the board of county commissioners of Monroe county the authority to regulate zoning, building, and electrical and plumbing works in *unincorporated areas of the county*. I might also add in passing that the various sessions of the legislature have passed similar acts for counties as they began a surge of growth and expansion in the undeveloped areas of such counties. (See Ch. 59-1248, Duval county; Ch. 21445, 1941, Orange county; Ch. 11679, 1925, Escambia county; also Orange and Pinellas counties, *supra*.)

Such was the basis for an opinion issued January 11, 1928, by my predecessor in office, Hon. Fred H. Davis, who later served as a justice of the Florida supreme court. In that opinion, Attorney General Davis said:

It appears that §2256 was intended to provide for the maintenance of *sanitary plumbing* in thickly populated communities adjacent to cities of 75,000 inhabitants or more and in order to insure that end being accomplished such section provides for the appointment of a plumbing inspec-

tor to inspect all plumbing and drainage facilities installed in the territory embraced in the radius of one mile beyond said city or town limits, which plumbing and drainage must be done in conformity with the rules and regulations governing plumbing in the city or town contiguous thereto.

The legislature evidently had in mind that on the outskirts of every city of 75,000 population or more are occupied houses which might at any time become a part of the city by the extension of the boundaries of the city to include this outside territory. . . *it was intended that for the sake of uniformity all plumbing done outside a city . . . in Dade county the plumbing inspector appointed by the county commissioners of said county has jurisdiction of all plumbing installed within the territory embraced in a radius of one mile beyond said city limits . . . the obvious purpose of §2256 was to give such inspector jurisdiction over unincorporated territory adjacent to Miami and cities similarly situated.*

* * *

I have not investigated the particular charter powers of Miami or these other municipalities, *but it is possible that something might be found which would take the case entirely out of the provisions of the general law.* (Emphasis supplied.)

It appears that application of Ch. 553, *supra*, has the same purpose, which is to provide the board of county commissioners the authority to appoint plumbing inspectors for either small communities or undeveloped areas in the county for the purpose of enforcing the laws of this state relating to plumbing which includes the minimum requirements of the state plumbing code (being Ch. VIII of the rules of the state board of health). As an alternative to such authority invested in the board of county commissioners under the general law, the legislature enacted Ch. 61-2503, special acts for Monroe county, providing for zoning, building, plumbing, and electrical codes to be adopted and enforced on a practical, reasonable basis which would meet the need of the area affected.

In implementing any acts of the legislature for the purpose of giving effect to *legislative intent*, all rules, regulations, or codes, adopted under color thereof, must adhere to the basic principles of *reasonableness* and be designed to provide the greatest amount of *protection to the public health*.

See *Lewis v. State Board of Health*, 143 So. 2d 867, wherein the first district court of appeals ruled invalid nine pages of single spaced printed rules of the state board of health, relating to the use of dangerous, poisonous pesticides, which were adopted to protect the public health; *Barrow v. Holland*, 125 So. 2d 749, wherein the supreme court held that rules adopted by the game and fresh water fish commission, an agency clothed with constitutional authority to enact its own laws, were invalid; *City of Coral Gables v. James B. Burgin*, 143 So. 2d 859, wherein the supreme court held that the regulation of the plumbing trade was not a matter so peculiar to the cultural and aesthetic qualities of the city of Coral Gables that it should dominate it and that the county regulation was controlling and not the more stringent city ordinances; *Stadnik v. Shell's City, Inc.*, 140 So. 2d 871, a case wherein the supreme court (in holding that a certain rule of the Florida state board of pharmacy was invalid) said that, "*The sole question is whether there is any reasonable relationship between the adminis-*

trative rule and the public safety, health, morals and general welfare."

"Zoning, which constitutes legislative action, is the separation or division of a municipality into districts, the regulation of buildings and structures in such districts in accordance with their construction and the nature and extent of their use, and the dedication of such districts to the particular uses designed to subserve the general welfare." (101 C.J.S. 660, §1). "The purpose of zoning, as variously stated, is to stabilize the use, and conserve the value, of property, to preserve the character of the neighborhoods, and to promote the health, safety and welfare of the community." (101 C. J. S. 665, §2). The statement is made in 58 Am. Jur. 940, §1, that "zoning regulations are confined to structural and use restrictions imposed upon the owners of real estate within prescribed districts or zones." See also definition of "zoning" in 45 Words and Phrases, Perm. Ed.

When the above mentioned provisions of Ch. 381, F. S., and the provisions of Ch. 61-2503 are duly considered and construed together, it seems clear that they relate to distinct and separate purposes. The said provisions in Ch. 381, F. S., relate to the public health and the preservation of the same, while the said provisions in Ch. 61-2503 relate to structural and use restrictions imposed upon owners of real property within the prescribed district or zone. The rules and regulations adopted by the state board of health relative to septic tanks are health regulations, while those adopted by the board of county commissioners of Monroe county as a zoning board relative to septic tanks are zoning regulations imposed upon the use of real estate. Irrespective of the zoning regulations, the regulations issued by the board of health must be conformed to. Compliance with the regulations of the zoning board does not excuse a builder from conforming to the health board regulations. It may be possible that there may be fields where the regulations of the two agencies may overlap. However, such overlapping should be rare because of the distinction between the purposes of the said two agencies.

062-138—October 23, 1962

TAXATION

HOMESTEAD TAX EXEMPTION—APARTMENTS IN BUILDINGS OCCUPYING MORE THAN HALF ACRE—§§1, 5, 7, ART. X, STATE CONST.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

May homestead tax exemption be allowed those homesteaders owning and occupying apartments in condominium and cooperative type buildings which occupy more than one-half acre of land within incorporated municipalities?

This question arises because of the provision in §1, Art. X, State Const., confining homesteads to "the half of one acre within the limits of any incorporated city or town." Under §5, Art. X, once a homestead is established outside of an incorporated city or town, subsequent incorporation of the homestead into a city or town will not reduce the homestead area.

Our opinions 061-190 of Dec. 11, 1961, 062-22 of Jan. 29, 1962,

and 062-70 of May 16, 1962, holding that homestead tax exemption was available to homesteaders owning apartments in condominium and cooperative type apartment buildings, under the limitations of §7, Art. X, State Const., considered only apartments in buildings occupying not more than one-half acre of land in an incorporated city or town. We have not yet considered the effect on homestead rights of such owners when the apartment building occupies an area in excess of one-half acre of land in an incorporated city or town. The owners of the condominium type apartments, as well as many of the cooperative type apartments, own the apartment occupied by them in fee simple and the foundation, common halls, roof, common walls, and other properties of the apartment building in common with the other apartment owners. Here we have two types of ownership, the actual apartment owned being vested entirely in its owner and occupant and the common properties being held by the said apartment owners in common with all the other apartment owners. Under our opinion 062-22 of Jan. 29, 1962, it was held that the said interests, apartment and undivided interest, may be assessed to the owner. Such assessment may be made in one assessment entry.

Should a one-story multiple dwelling house or apartment, occupying more than one-half acre of land, be so constructed that each dwelling unit thereof, together with the land upon which located, may be separately conveyed, nothing in §7, Art. X, State Const., or other section of said article, would prevent such owner from receiving homestead tax exemption, if otherwise qualified. Actually an apartment on any floor of a multiple story apartment building, through that portion of the building under it, which in many instances may consist of substantially like or similar apartments, and the common walls and foundation, would occupy less than one-half acre of land, although the entire apartment building occupied more than one-half acre of land.

Doubtless the fee title of the apartment itself, as distinguished from the properties common to all apartment owners, will in all instances where a multiple story apartment is involved, exceed the amount of the exemption that may be allowed the applicant, in which instances it is suggested that the amount of the exemption be allowed on the valuation of the apartment as distinguished from the common properties.

The above stated question is answered in the affirmative subject to the above comments.

062-139—October 23, 1962

TAXATION

DOCUMENTARY STAMP TAXES—SUBSTITUTED PROMISSORY NOTES AND MORTGAGES—

§§201.08, 201.09, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where two promissory notes, secured by separate mortgages encumbering real property, are substituted in lieu of a single promissory note secured by a single mortgage encumbering the same real estate as is described in the said separate mortgages, upon which proper documentary stamp taxes were paid, are said two promissory notes liable for additional documentary stamp taxes?

We gather from your file, handed us with your said request for opinion, that the owner of 300 parcels of land, to secure the payment of a promissory note made by him, mortgaged the said 300 parcels of land to a mortgagee; however, the said owner, with the consent of the holder of the said promissory note and mortgage securing its payment, issued two promissory notes in lieu of the said original note, which two notes were secured by mortgages encumbering the same land; one of said promissory notes being secured by a mortgage encumbering 30 of the said 300 parcels of land and the other of said promissory notes being secured by a mortgage encumbering the remaining 270 parcels of land. The principal amount of the said two promissory notes totaled the principal amount of the one promissory note which they replaced or were substituted for. These two substituted promissory notes were clearly new contracts by the maker of the original promissory note, and are subject to taxation as such under §201.08, F. S., unless they are deemed a renewal of the said first promissory note within §201.09, F. S.

The supreme court of Florida in *Lee v. Quincy State Bank*, 127 Fla. 765, 173 So. 909, held that a "renewal of a note involves a new contract by the maker or obligor." "A renewal, as distinguished from a mere extension, is usually evidenced by a new note or other instrument." (10 C. J. S. 758, §263). It is clearly evident from *Lee v. Quincy State Bank*, supra, that a renewal note was subject to documentary stamp taxes under §201.08, F. S., prior to the enactment of §201.09, F. S. We reach the conclusion that the two notes which were substituted for and in lieu of the original note are subject to taxation under §201.08, F. S., unless they are in law and fact renewal notes under §201.09, F. S.

In 10 C. J. S. 758, §263, it is stated that "the term 'renewal,' as applied to a note, means the reestablishment of the particular contract for another period of time, given when the prior or original note becomes due. There may be a change of parties or an increase of security, but there is no renewal unless the obligation is the same. A renewal, as distinguished from a mere extension, is usually evidenced by a new note or other instrument." The above phrase "given when the prior or original note becomes due" is supported only by *Stokes v. Sanders*, 181 App. Div. 249, 168 N. Y. S. 409, which case in fact held that a note given in lieu of another after maturity was not a renewal note. In *Livestock Nat'l Bank v. Minnehaha State Bank*, 52 S. D. 172, 217 N.W. 180, it was held that the insertion of the name of a new payee in a renewal note did not change its character as a renewal note. A part payment of the principal of a note and the execution and delivery of a new note for the balance was held a renewal of the note in *Moncrief v. Atlanta and Lowry Nat'l Bank*, 36 Ga. App. 371, 136 S. E. 825. In 76 C. J. S. 1165, it is stated that "'Renewal' means the substitution of a right or obligation for another of the same nature, the substitution in place of one engagement of a new obligation on the same terms and conditions; the establishment, extension, or reestablishment of the particular contract for another period of time. . . ."

"While it has been held that the word 'renewal' is not to be construed so narrowly that it means a renewal on the identical terms and under the identical conditions of the old obligation, it has frequently been said that in commercial and legal usage the term, renewal, means something more than the substitution

of another obligation for the old one; and, in order for there to be a renewal, the new obligation must be of the same nature as the prior obligation, with the same terms and conditions. However, there may be an increase of the security and there may be a change of parties. . . ." (76 C. J. S. 1165 and 1166). Here we have what appears to be a modification and renewal of the obligation evidenced by the original note, by the substitution of two promissory notes for and in lieu of the original note without changing the overall obligation.

We are, therefore, of the opinion that the two promissory notes substituted for the original one, without making any change in substance of the existing contract, are in law renewal notes within the purview of §201.09, F. S., and are exempt under said section, provided that documentary stamp taxes due on the original note have been paid in full and the requirements of said §201.09, F. S., are complied with. The renewal notes should be kept together, with the original note attached thereto, unless one of the said renewal notes is negotiated in which case the original note should be kept with the remaining note with a notation to that effect being made on the one negotiated.

062-140—October 23, 1962

LEGISLATURE

ELIGIBILITY OF MEMBER OF 1961-1962 HOUSE OF REPRESENTATIVES TO SEEK NEWLY CREATED LEGISLATIVE POST IF REAPPORTIONMENT LEGISLATION APPROVED—CHS. 62-1, 62-3, LAWS OF FLORIDA, 1962; §5, ART. III, ART. VII, §15, ART. XVI, STATE CONST.

To: Jack A. Saunders, Representative, Monroe County, Key West
QUESTION:

Will a member of the 1961-62 house of representatives be eligible in the light of §5, Art. III, State Const., to seek one of the additional legislative posts described in the proposed constitutional reapportionment amendments enacted during the 1962 extraordinary session of the legislature in the event the constitutional reapportionment amendments are approved by the electors at the general election on Nov. 6, 1962?

Section 5, Art. III, State Const., provides:

No senator or member of the house of representatives shall *during the time for which he was elected*, be appointed, or elected to any civil office under the constitution of this state that has been created, or the emoluments whereof shall have been increased during such time. (Emphasis supplied.)

The term of office for members of the legislature expires on election day, that is, the first Tuesday after the first Monday in November, rather than on the first Tuesday after the first Monday in January following the general election, as is the case for most other constitutional offices. (See Art. VII, State Const.)

In view of the fact that the additional seats in the legislature authorized under the proposed reapportionment amendments to the constitution will (if adopted) in reality be created by the public through ratification of a legislative proposal in the nature of constitutional amendments rather than by the legislature act-

ing alone, it would appear doubtful that it could be said that the legislature in fact created the additional positions authorized in the constitutional reapportionment amendments to be offered to the public on Nov. 6, 1962.

Considering §5, Art. III, State Const., for the moment, it should be pointed out that it could only apply during the term of the members elected to the 1961-62 legislature and since the term of the current house members expires Nov. 6, 1962, and the election of additional new representatives and senators cannot, under the provisions of Chs. 62-1 and 62-3, be elected until sometime subsequent to the current term of office, which as pointed out above expires Nov. 6, 1962, the additional seats could not be filled during the term for which the present house members were elected in the light of §5, Art. III, State Const. (See *Davis ex rel Taylor v. Crawford*, 95 Fla. 438, 116 So. 41.)

This being the case a member of the 1961-62 house of representatives would not be prohibited from seeking one of the newly created legislative positions should he desire to do so nor am I aware of any provision which would require his resignation from his present seat before qualifying for an additional seat in the event of the approval of the constitutional reapportionment amendments. Thus, if a present member of the house of representatives is re-elected to continue in office in his present seat and desires to qualify for one of the additional house seats or more likely one of the additional senate seats, assuming the adoption of the constitutional reapportionment amendments, he would not under the law be required to resign the seat to which he was elected on Nov. 6, 1962, in order to run for one of the newly created house or senate seats. He could not, however, under the provisions of §15, Art. XVI, State Const., hold both offices at the same time and thus upon election and qualification to the additional office he would automatically vacate the original office creating a vacancy to be filled under the provisions of Ch. 100, F. S., as would the newly created vacancies. Needless to say, in an instance where an incumbent house member is re-elected to a successive term for the same seat on Nov. 6, 1962, and the reapportionment amendments approved on the same date, he could without resigning his seat run for the senate seat which will be authorized for Monroe county and upon the event of his election to the senate the house seat would automatically become vacant and it would then be incumbent upon the governor to call another election to fill the vacant house seat. While there may be some question as to the popularity of such action in view of the added expense to the taxpayers of calling for the election in the event he should run for senator without first resigning his house seat, this is a matter of no concern to this office in view of the fact that it would not be in violation of the election laws to do so.

Your question as set out above and the ramifications thereto are answered accordingly.

062-141—October 23, 1962

PUBLIC HEALTH
LOCAL HEALTH UNIT TRUST FUNDS—TRANSFER TO
COUNTY FOR DEPOSIT OR INVESTMENT—
 §154.02; CH. 154, F. S.

To: *Harry G. Smith, Director, State Budget Commission, Tallahassee*

QUESTION:

May local health unit funds, collected and remitted under §154.02, F. S., and deposited in the state treasury to the credit of "the full-time local health unit trust funds of the county by which such funds were raised," be returned to the county for deposit or investment?

Section 154.02, F. S., provides for the levy and collection of certain local health unit taxes "which, when collected, shall be paid to the state board of health for deposit with the state treasurer." Such funds in the hands of the state treasurer "shall be known as the full-time local health unit trust funds of the county by which such funds were raised; and said funds shall be expended by the state board of health solely for the purpose of carrying out the intent and object of" Ch. 154, F. S. The state board of health furnishes the counties with "a semiannual financial statement of disbursements thereof."

Our opinion 062-79 of June 11, 1962, dealt with the transfer of a county's share of the building fund on deposit with the state treasurer under said §154.02, for the sole and only purpose of constructing an addition to the local health unit building; the purpose for which the funds had been raised. Other county funds were to be added to the funds returned to the county for the purpose of constructing needed facilities. Before the said funds were to be transferred it was required that such be done on the joint written agreement of the county board, the county health unit board, the state board of health, and the state budget board.

Here the purpose of the transfer of funds is not the carrying out of the purposes for which raised, but merely and only for deposit at interest or the purchase of securities designed to provide an income therefrom. The directions of §154.02, F. S., are that such funds be deposited in the state treasury in "the full time local health unit trust funds. . . ." We find nothing in said §154.02, F. S., or elsewhere in Ch. 154, F. S., authorizing the transfer of such funds out of the state treasury for the purposes contemplated in the above stated question.

The above stated question is answered in the negative.

062-142—October 24, 1962

MUNICIPALITIES
RESTRICTION OF USE OF MUNICIPAL PARKS, PLAY-
GROUND, BEACHES, ETC.—ASSESSMENT OF FEE FOR
USE OF BEACHES—CH. 25786, 1949, LAWS OF FLORIDA

To: *John Ross Adams, City Attorney, Delray Beach*

QUESTIONS:

1. Does the city of Delray Beach have the authority to restrict that portion of the public beach lying above the high water mark and within the limits of the city

to use by residents of the city and their guests?

2. Does the city of Delray Beach have the authority to charge a fee for the use of the public beach referred to in question 1?

According to your conversation and the memorandum which you left with this office, the property in question is municipal beach property adjacent to but above the foreshore and high water mark of the Atlantic ocean lying within the city limits which was originally dedicated to be used for public roads. Said dedication was later accepted by the city and there is no issue over the ownership of the property by the municipality. A four-lane highway has since been built on part of the property in question and the remainder thereof extends from the eastern shoulder of the road to the high water mark of the Atlantic ocean. The city has also agreed that if in the future the road needs to be widened, said beach property will be available for public road purposes.

AS TO QUESTION 1:

With regard to question 1, concerning the authority of the city to restrict the use of the public beaches to residents, the following observations are found in Florida Jurisprudence referred to in your memorandum:

Generally, the purpose of public parks is to secure the common good of mankind. The use of such areas is of more than local interest, and becomes the concern of the state. Such public parks are held not for the sole use of the people of a particular community, but for the use of the general public without reference to the residence of the user. (24 Fla. Jur. 175, Parks and Recreation Centers, §6.)

American Jurisprudence defines parks, squares, and playgrounds as follows at 39 Am. Jur. 803, Parks, Squares and Playgrounds, §2:

. . . The term "park," as now commonly understood in this country, means a piece of ground acquired by a city, town, or other public authority, for ornament, and is a place for the resort of the public *for recreation and amusement*. . . (emphasis supplied), citing *Ocean Beach Realty Co. v. Miami Beach*, 106 Fla. 392, 143 So. 301, at 302.

It would seem that a public beach such as the one under consideration here and as are generally found along the coasts of Florida would fall within this definition of a park.

Continuing, American Jurisprudence makes the following observations with regard to parks, squares and playgrounds as defined above:

The dominant aim in the establishment of public parks appears to be the common good of mankind, rather than the special gain or private benefit of a particular city or town. The beneficial influence of parks in and near congested areas of population is of more than local interest and becomes a concern of the state under modern conditions. It relates not only to public health in its narrow sense, but to broader considerations of exercise, refreshment, and enjoyment. Such public parks are held not for the sole use of the people of a particular municipality, but for the

use of the general public which the legislature represents. The use of the park is in kind analogous to those confessedly public. It closely resembles roads and bridges. These are open to general public travel without reference to the residence of the traveler. The enjoyment of a public park hardly can be restricted to residents of a particular city or town. . . . (39 Am. Jur. 815, Parks, Squares and Playgrounds, §18, Use Generally.)

In addition, the charter for the city of Delray Beach appears to be contained in Ch. 25786, 1949, as amended, and §188 of said charter provides:

The city council shall not in any manner alienate from the public, the public beach or any part thereof, of the city of Delray Beach, Florida. (Emphasis supplied.)

In the light of the general rules cited above, it would appear that the city is without the necessary authority to restrict the use of its beach to residents of the community. In addition, it would appear that the legislature may have taken this question into consideration in enacting §188 of the charter of Delray Beach which is quoted above. Legislative intent is the pole star by which we must be guided in construing acts of the legislature (Ervin v. Peninsular Tel. Co., Fla., 53 So. 2d. 647, Smith v. Ryan, Fla., 39 So. 2d. 281, and Fla. State Racing Comm. v. McLaughlin, Fla., 102 So. 2d. 574) and it would seem most logical to conclude that the legislature may have in its wisdom foreseen the time when the instant question would arise. Realizing that the beaches of a city such as Delray Beach would be a major attraction to nonresident tourists who have in the past and will undoubtedly in the future, make a substantial economic contribution to the community, the legislature, in the interest of a continued and stable economy for the community, sought to protect such interest in the beaches as the visitor might have by making it unlawful for the city council to alienate in any manner from the public its privileges with regard to the general use of the beaches.

In view of the general law cited herein which appears to be applicable to this question and the special legislation concerning this matter, it would appear that the city council would be *without the authority* to restrict the use of the municipal public beaches to residents of the community.

Question 1 as set out above is therefore answered in the negative.

AS TO QUESTION 2:

With regard to question 2 as to the legality of charging a fee for the use of the beach facilities, let me point out that generally a public beach or recreation area cannot be made a source of revenue as may a public utility. (See 39 Am. Jur. 815, Parks, Squares and Playgrounds, §18, Use Generally.) However, the authorities do indicate that a fee may be charged for the use of parks, playgrounds, beaches and recreation areas so long as there is a reasonable relationship between the fees charged and the expenses involved in operating the facility. See Bullock v. Wooding, et al., 123 N. J. 176, 8 Atl. 2d 273, Kirsch Holding Co. v. Borough of Masanquan, 24 N. J. 91, 93 Atl. 2d 582, (reversed on other grounds), 23 Fla. Jur. 167, §160, Fees and Charges, and Atkins v. Phillips, 26 Fla. 281, 8 So. 429, 10 L. R. A. 158. It is to be noted in passing that since most municipal beaches in Florida

have been provided by nature and there is generally little or no upkeep required to maintain a beach, it would seem likely that in the majority of cases there would be little, of any, justification for charging a fee for the use of a public beach in this state.

Question 2 as set out above is answered accordingly.

062-143—November 5, 1962

COUNTY ORGANIZATION—PUBLIC MONEY
WRITE-OFFS—COUNTY HOSPITAL ACCOUNTS RECEIVABLE
—§17.041, F. S.

To: *Bryan Willis, State Auditor, Tallahassee*

QUESTION:

Is a board of county commissioners, in connection with its operation of a county hospital, authorized, through an accounting process of charging to "bad debt expense," to write off noncollectible accounts receivable?

It is assumed that your inquiry relates to the write-off of accounts prior to certification to the comptroller by the state auditor (§17.041, F. S.).

In AGO 060-90, the authority of the board of county commissioners to compromise settlements with private individuals who owe accounts to the county is recognized in those instances where such compromise results in a benefit to the county which flows from the settlement of a liquidated amount.

Said opinion also notes that:

The compromise of an undisputed claim will be a gift if no benefit flows to the county. A benefit may flow even though the claim is undisputed where the debtor gives a concession to which the state is not legally entitled; such as, where the debtor is incapable of paying the claim and agrees to pay from the proceeds of homestead property or other exempt property. If the debtor does nothing but that which he is legally bound to do, then there is no consideration for the compromise settlement; and the settlement may be successfully attacked within the limitation provision of §95.09, F. S.

Although the operation of a public hospital as to pay patients may be deemed the exercise of a proprietary function of a governmental entity (*N. Broward Hosp. Dist. v. Adams*, 143 So. 2d 355; *Suwannee County Hosp. Corp. v. Golden*, 56 So. 2d 911), the funds of said hospital are nevertheless public moneys within the purview of the safekeeping laws applicable thereto. Hence, there is great doubt that a board of county commissioners operating a public hospital is authorized to write off—in the sense that the total debt is thereby extinguished—an account owed said hospital by an individual who entered the institution as a pay patient.

It would appear that after a board of county commissioners had undertaken a reasonably diligent effort to collect unpaid accounts owed by individuals, such accounts could be by book-keeping transfers removed from the active accounts receivable. This would give a true picture of the financial condition of the hospital which in turn would obviously be reflected in its per day per patient cost of operation.

The gravamen of the answer to your query is what effort

should be made by the board to collect delinquent accounts owed the hospital. In this area that degree of discretion which a successful businessman would use in the conduct of the affairs of his business would appear to be the test. Undoubtedly, an investigation of the financial affairs of the delinquent debtor would reveal whether judgment should be sought. In such determination it should be noted that judgments obtained are enforceable for a period of 20 years.

Your question is answered in the affirmative subject to the limitation that such write-off should not be accomplished in such manner as to constitute an extinguishment or forgiveness of the debt.

062-144—November 5, 1962

TAXATION

FORT PIERCE PORT AND AIRPORT AUTHORITY—TAXATION OF PROPERTY LEASED TO PRIVATE INDIVIDUAL OR CORPORATION—CH. 61-2754, LAWS OF FLORIDA; §192.62

F. S.; §1, ART. IX, §16, ART. XVI, STATE CONST.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Where lands belonging to a port and airport authority are leased to a private person, firm or corporation, who constructs buildings thereon and uses the same for other than public purposes, are such lands or the buildings thereon subject to ad valorem taxation?

Specifically we are here concerned with a lease made by the Fort Pierce port and airport authority to some individual, firm or corporation for the purpose of constructing business buildings thereon to be used for other than public purposes; that is, to be used for business and profit-making purposes. The said port and airport authority was established by Ch. 61-2754, which act at the same time abolished the Fort Pierce port authority and transferred its property and obligations to the said port and airport authority. This port and airport authority is administered by the board of county commissioners of St. Lucie county, as the ex officio board of the said port and airport authority.

It is presumed that under Ch. 61-2754, establishing the Fort Pierce port and airport authority, with the St. Lucie board of county commissioners as the ex officio governing board thereof, the authority was duly authorized by said Ch. 61-2754 to make the lease of real property mentioned in the above stated question for the purposes above mentioned. Section 19 of said Ch. 61-2754, declares that said "port and airport facilities acquired and constructed under the provisions of this act will constitute public property used for public purposes, no taxes or assessments shall be levied upon such airport and port facilities or upon the income therefrom, and any bonds or revenue certificates issued under the provisions of this act, their transfer and income therefrom (including any profit on the sale thereof) shall at all times be free from taxation within the state."

Here we are dealing with an ad valorem tax in connection with which we must take into consideration the provisions of §1, Art. IX, and §16, Art. XVI, State Const., which limits statutory exemptions from taxation to such property as is held and used for religious, scientific, municipal, educational, literary and

charitable purposes. This case seems to bear a close relation to *Illinois Grain Corp. v. Schleman*, Fla. App. 3rd, 144 So. 2d 329, which involved a grain elevator (a permanent structure) located upon lands leased from the Hillsborough county port authority, and subleased to the Illinois Grain Corp., a corporation transacting business in Florida. Section 20, of Ch. 23338, 1945, the Hillsborough county port authority act, was a tax exemption statute like or similar to §19 of said Ch. 61-2754, above mentioned. We note that the court, in the course of its opinion, remarked that "we hold that the lower court ruled correctly in determining that the lands involved have been held, occupied and used exclusively by Illinois for its private business purposes and not for a public or municipal purpose, and that said lands are not exempt from taxation." Moreover, the record amply supports the finding that the Illinois Grain Corp. is operated solely as a private commercial enterprise. Anyone interested in the question might profit by a study of this opinion.

In *State v. Clay County Devel. Authority*, Fla., 140 So. 2d 576, the authority proposed to issue revenue anticipation revenue certificates and from the proceeds thereof to construct and equip an industrial plant on lands of the authority for the purpose of leasing to a private corporation, this was held to be an invalid purpose violative of the constitutional provision against lending the credit of the county. In other words the purpose of the proposed improvement was private and not public. In *Panama City v. Pledger*, 140 Fla. 629, 192 So. 470, the city of Panama City had leased certain municipal real property to a paper manufacturing company to be used by the said company as a dock, the greater portion of which would be used exclusively for private corporate purposes. The property, although owned by the municipality, was held not tax exempt.

Here the title to the property in question is vested in the Fort Pierce port and airport authority, not in the county of St. Lucie, although the board of county commissioners is the ex officio governing board of the district. In *Park-N-Shop, Inc. v. Sparkman*, Fla., 99 So. 2d 571, the title to the property leased was vested in the county, which was held to have an immunity from taxation in that case. This case, therefore, differs from the *Park-N-Shop, Inc.* case, but is within the purview of *Ill. Grain Corp. v. Schleman*, Fla. App. 3rd, 144 So. 2d 329, and is controlled by it.

The above stated question is, therefore, answered in the affirmative. This is true whether the assessment was to be made prior to or after the effective date of §192.62, F. S., which was June 16, 1961.

062-145—November 5, 1962

TAXATION

DOCUMENTARY STAMP TAXES—LEASEHOLDS AND SIMILAR INTERESTS—TAXABILITY—§§201.02, 201.08; CH. 201, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are leases of real property, and the covenant to pay rent therein contained, subject to taxation under and pursuant to Ch. 201, F. S., and if so, what is the measure of such taxation?

A lease of real property is a species of contract for the possession and profits of lands and tenements, either for life, or for a certain period of time, or during the pleasure of the parties; the essential elements of a contract must be present. A lease is generally regarded as a conveyance or grant of an estate in real property for a limited term with conditions attached which must always be for a shorter term than the lessor has in the property leased (51 C. J. S. 803, §202). Usually the interest of the lessee is known as a leasehold or leasehold interest, which is regarded as a chattel real. The authorities draw a distinction between leasehold estates for a term of years and leasehold estates for the life or lives of persons in being.

Nature of real estate leases for a term of years.—The statement is made in *De Vore v. Lee*, 158 Fla. 608, 30 So. 2d 924, text 926, that "at common law estates for years were classified as chattels real and regarded as personal property"; in 1 Thompson on Real Property, Perm. Ed. 67, §61, that "at common law an estate less than a freehold, such as estates for years, at will, and by sufferance, was personal property,"; in 32 Am. Jur. 39, §16, that "the interest of a tenant in a term for years is deemed at common law personal property as distinguished from real estate, however long its duration in years,"; and in 51 C. J. S. 531, §26, that "except in so far as the common-law rules may have been modified by statute, terms for years, however long, are chattels real, falling within the classification of personal property."

Nature of real estate lease for life.—In 33 Am. Jur. 460, §2, it is stated that "it is well settled that a tenant for his own life, or the life of another, is a freeholder, . . ." In 31 C. J. S. 39, it is stated that "a life estate is a freehold interest in lands, . . ." A life estate in real property is itself real property; while an estate for years is personal property. A lease of real property for life is real property, but a lease of real property for a term of years, however long or short, is personal property. Although leases of real property for a term of years are deemed personal property once they have been created, they constitute an interest in real property under the Statutes of Frauds (37 C. J. S. 576, et seq., §§68, et seq.; 49 Am. Jur. 488 et seq., §§149, et seq.; 15 Fla. Jur. 9-11, §6).

Florida cases.—The Florida supreme court considered the application of Ch. 201, F. S., to leases and leasehold interests of and in real property located in Florida in *Dundee Corp. v. Lee*, 156 Fla. 699, 24 So. 2d 234; *De Vore v. Lee*, 158 Fla. 608, 30 So. 2d 924; and *De Vore v. Gay*, Fla., 39 So. 2d 796; which three cases, when read and construed together, seem to hold that instruments granting leases and leasehold interests are within the purview of said Ch. 201, F. S., when the consideration therefor amounts to outright obligations for the payment of money, and not merely contingent obligations. We doubt that the court has drawn any distinction between leasehold interests for a term of years and leasehold interests for the life or lives of a person or persons in being. The court, in *Dundee Corp. v. Lee*, appears to have blended, and probably confused, the application of §§201.02 and 201.08, F. S., in their application to leases and leasehold interest in real property. In this case the court deemed the term "written obligation to pay money" to extend to covenants in leases of real property for the payment of rent when the same amounts to an outright obligation to pay money, as distinguished from a contingent obligation to pay money. When the opinions of the court in the said three cases are read together,

and construed in the light of each other, we arrive at the conclusion that the covenant in a lease of real property to pay rent is "a written obligation to pay money," within the purview of §201.08, F. S., when definite and fixed and not contingent; when an outright obligation to pay money.

In *De Vore v. Lee*, supra, the court had before it the application of Ch. 201, F. S., to leases of real property for a term of years; remarking that "a lease has been defined as 'a conveyance by the owner of an estate to another of a portion of his interest therein for a term less than his own' and 'it (which) passes a present interest in the land for the period specified,'" in the said lease. The court in this case also stated that "at common law estates for years were classified as chattels real and regarded as personal property." The above mentioned three cases hold in substance that where the consideration for a lease agreement is paid monthly, or other periodic time, the obligation for the use of the property accrues monthly, or other period of time as the case may be; whether paid at the beginning or ending of the said period of time.

Outright obligation to pay money contemplated.—When the above three cases are considered together, it appears that the court reached the view that the written obligation to pay money, contemplated by Ch. 201, F. S., is "an outright obligation to pay money," and not a mere contingent obligation incapable of determination as of the time of the making of said obligation. The court, concerning the obligation to pay rent involved in the *De Vore* cases, stated that the obligation there involved was "contingent, and . . . periodically ripens into a debt only as the time for payment of rent arrives. . . ." In other words, the debt becomes fixed from time to time as the amount of rental is earned by the use of the property by the lessee. Under the average real estate lease, the rent to be paid is usually to be paid periodically as the premises are occupied, each payment entitling the lessee to occupy the premises for the period paid for. In *De Vore v. Gay*, supra, the court remarked that "when taxes are to be levied according to a monetary consideration, the law contemplates that such tax should be confined to the actual monetary considerations or to considerations which have a reasonably determinable pecuniary value." Under the usual lease of real property, the consideration passing to the lessor from the lessee are executory considerations dependent upon occupancy, or the availability of the building for occupancy. This appears to have been the view of the court in *De Vore v. Gay*, supra.

In *Metropolis Pub. Co. v. Lee*, 126 Fla. 107, 170 So. 442, there was involved an agreement by and between a newspaper and a businessman for display advertising to be run by the newspaper for the businessman as and when desired. The rate of compensation was to be measured by the area of the advertisements. There was no specified amount of advertisement to be used by the businessman each day, week, or otherwise; the obligation of the businessman to the newspaper accrued as and when an advertisement was run in the paper. There appears to have been an estimate by the businessman of the amount of advertisement to be run from time to time. This was held to be an executory contract so that it was not possible, at the time of the making of the contract, to calculate the documentary stamp taxes on the document. The amount of the consideration to be paid under the agreement was

contingent with the amount of advertisement taken from time to time, and incapable of final determination until the last advertisement had been run. This agreement was held not within the statute, except as to a nominal consideration or the down payment made. To the same effect see *Lee v. Kenan*, CCA 5th, 78 Fed. 2d 425.

Lease agreement laid before us.—Your said request for opinion laid before us, and the request is directly concerned with the lease of space in the Larchmont apartments or apartment building located in the city of Naples, bearing date of April 15, 1962, by and between the owner of said apartment building and the lease of space therein consisting of a two-bedroom, second-floor apartment. This lease grants to the lessee the exclusive use and possession of the two-bedroom apartment described. The duration of said "tenancy shall be for a period of ninety-nine years, commencing on the 15th day of April, 1962, and continuing through the 15th day of April, 2061, unless sooner terminated" as provided in and by the said lease. Cancellation may be based on failure to pay rental payments, default in assessment payments, misconduct, etc. The lease provides for the consideration for the lease as follows: And for the payment of "assessments" to an association of apartment owners to be subsequently organized as follows:

That "The association," for and in consideration of the payment by the lessee to "the association" of an assessment in the amount of \$34 each month, shall maintain and manage "the apartments." The first such payment shall be made on the date on which the said apartment unit is ready for occupancy, and subsequent payments shall be made on the first day of each month thereafter for the purposes specified. "The association" shall be solely responsible for all maintenance and management under the terms and conditions contained herein, after the first year.

The leases of apartments are made subordinate to a first mortgage encumbering the apartment building and the lands upon which located.

Consideration paid for apartment.—Under the terms of the above lease agreement the consideration to be paid for the 99 year lease of the apartment described in the lease agreement before us is \$1,295 paid by the lessee to a real estate broker and recognized and approved by the seller; \$3,905 upon the execution of the lease by the lessee; and the sum of \$57.86 monthly for a period of 240 months; making a down payment of \$5,200 and monthly payments of \$57.86 per month for 240 months, or 20 years, or a total sum of \$13,886.40 over the 20-year period of time. If applicable here, the monthly rental payments should be reduced to their present value which should be added to the said \$5,200 to determine the consideration.

The monthly payment of \$57.86 over a period of 20 years is not a monthly compensation for occupancy as was the case in the *De Vore* cases, but is an installment in the payment of the consideration, with interest added, for the leasehold interest purchased by the lessee. There is a clear distinction between the lease before us and the one involved in the *De Vore* cases. In the *De Vore* cases the monthly payments were for the use during the applicable month; here they are but installments in the consideration for a 99 year lease, payable over a 20-year period.

Leasehold interests.—Under §43.4361, 1962 federal tax regulations, we find that the term "realty" in connection with federal

documentary stamp taxes on conveyances is defined as including "those interests in real property which endure for a period of time, the termination of which is not fixed or ascertained by a specific number of years, such as an estate in fee simple, life estate, perpetual easement, etc., . . ." We further note from the same regulation that "ordinary leases of real property for a definite term of years" are not subject to federal documentary stamp taxes. The distinction between estates for life and estates for a term of years may account for this distinction under the federal statutes. Leases for life are deemed real property, and leases for a term of years personal property, under the common law. Under the federal statutes (title 26, §4361) documentary stamp taxes are imposed on instruments "whereby any lands, tenements or real property shall be granted, assigned, transferred or otherwise conveyed to, or vested in, the purchaser. . . ." This section seems to have its origin in §807 of the act of congress of 1924. We note a distinction between this federal statute and §201.02, F. S., which imposes a documentary stamp tax on instruments "whereby any lands, tenements, or other realty, or *any interest therein*, shall be granted, assigned or otherwise conveyed to or vested in the purchaser. . . ." Where the federal act extends to lands, tenements or real property, the Florida act not only extends to lands, tenements or realty, but also to "any interest therein." The federal act, which only extends to lands, tenements and real property, is not as broad as the Florida statute which extends not only to lands, tenements and real property, but also to any interest therein. We have hereinabove demonstrated that leasehold interests for a term of years are deemed interests in real property under the statutes of frauds. See also 22 Words and Phrases 101 and 102, 107 and 102, 225 and 226, and 232 to 235, wherein cases are collected which hold leasehold interests are interests in real property, at least as of the time of their creation.

Because of the distinction above mentioned between the federal act and the Florida statute, we feel that not only leasehold interests for a life or lives in being, but also leasehold interests for a term of years are within the purview of Ch. 201, F. S. This is not contrary to the holdings of the supreme court of this state in *Dundee Corp. v. Lee*, supra; *De Vore v. Lee*, supra; and *De Vore v. Gay*, supra; said cases turned not upon the taxability of the instruments before the court, but upon the consideration therefor, whether contingent or fixed. The court, in *De Vore v. Gay*, held that the rent being paid by the month, as occupancy was exercised by the lessee, was a contingent and not an outright obligation and not within the statute, except possibly as to the initial payment. There was no written obligation to pay within the purview of §201.08, F. S.; the obligation being contingent and not fixed, except possibly as to the initial rental payment. Here the consideration for the lease before us does not call for a month-to-month payment of rental, as the building leased is occupied, but for down payments of \$5,200 and 240 monthly payments of \$57.86, evidently including interest if payable. In determining the present consideration for the leasehold interest here involved, it will be necessary that these monthly payments be reduced to their present value. This seems to have been the rule followed in *Dundee Corp. v. Lee*, supra.

From the above and foregoing we hold that leases of real

property, whether for a term of years or for the life or lives of persons in being, are transfers of lands, tenements or other realty, or an interest therein, within the purview of §201.02, F. S., as also written obligations to pay money to the extent that such obligations are fixed as distinguished from contingent. We are inclined to the view that the obligations mentioned in the lease before us, and discussed above, are fixed obligations as distinguished from contingent obligations as were involved in *De Vore v. Lee*, and *De Vore v. Gay*, supra. The lease in question conveys an interest in land, within the purview of §201.02, and contains a written obligation to pay money to the extent the same is fixed as distinguished from contingent. The obligation in the lease before us seems to be fixed.

062-146—November 5, 1962

TAXATION EXEMPTION—SCHOLARSHIP LOAN FUNDS

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Is a perpetual revolving scholarship loan fund, consisting of a principal amount and earned interest, from which student loans are made at reasonable interest, for periods not exceeding five years, entitled to tax exemption?

This revolving scholarship loan fund was established from the residue of a decedent's estate, after the payment of all debts and obligations of the estate, and appears to have a present value of around \$200,000 available for loan purposes. Presently it appears that student loans are made at 3% per annum interest. Barring possible losses due to unpaid loans or otherwise, the loan fund would grow in amount. However, we will not make any estimate of the future value or values of the said revolving fund due to possible losses due to failure to repay loans or to pay interest. Here loans are not made from the income of the trust alone, but from the principal and income of the trust. The will provides that "the trustee shall hold the balance of the trust fund as a scholarship revolving fund."

This trust differs from the trust involved in *Florida Nat'l Bank v. Simpson*, Fla., 59 So. 2d 751, where the principal was to be held inviolate and the income of the trust used for the purposes mentioned in the will there involved. In the said *Florida Nat'l Bank* case the income of the trust, after the death of the devisees therein mentioned receiving annuities, only was to be used for trust purposes, the trust providing that "after the termination of all said life estates all of said net income (goes) to the Nemours foundation, a charitable corporation . . . for charitable uses." The contention was made, and rejected by the court, that because the remainder of the trust fund, after the payment of legacies, went into a charitable trust it was subject to tax exemption prior to that time. The question of the tax status of the trust fund after the payment of the legacies was not before the court; at which time the fund will pass from the trustee to a charitable foundation.

In *Powers v. First Nat'l Bank*, 138 Tex. 604, 161 S. W. 2d 273, text 280, in an opinion "adopted by the supreme court" of

that state, it was held that charitable trusts have "been held to include trusts to lend money to students, 2 Bogert, Law of Trusts and Trustees, §374, or to 'worthy American boys and girls' who promise to repay what they borrow, Owens v. Owens' Executor, 236 Ky. 118, 32 S. W. 2d 731, 734. . . . Without further discussion or citation of authority, we hold that, in so far as the purpose to be served is concerned, the trust set up by Mrs. Hofstetter to provide loans 'to ambitious and worthy boys and girls, who are financially unable to secure an education and would otherwise be deprived thereof' creates a public charity." In Russell v. Allen, 107 U. S. 163, 2 S. Ct. 327, 27 L. Ed. 397, text 400, the statement is made that "all gifts for the promotion of education are charitable in the legal sense." Scholarship funds to assist students to obtain an education, some cases relating to grants and others to loans, have been held to be charitable funds or trusts in *Stariha v. Hagood*, 252 Ala. 158, 40 So. 2d 85, text 88; *Ireland v. Jacobs*, 114 Colo. 168, 163 P. 2d 203, 161 A. L. R. 1413; *Quinn v. Peoples Trust and Savings Co., Ind.*, 60 N. E. 2d 281, text 284; re. *Hagans Will*, 234 Iowa 1001, 14 N. W. 2d 638, text 641; re. *Butler's Estate*, 137 N. J. Eq. 48, 42 A. 2d 857, text 858, also 137 N. J. Eq. 457, 45 A. 2d 598; *Litcher v. Trust Co.*, 11 N. J. 64, 93 A. 2d 368, text 373 and 376; re *Lewis' Estate*, 99 N. Y. S. 986, text 990; *Owen v. Owens' Executors*, 236 Ky. 118, 32 S. W. 2d 731, text 734; *People v. Stone*, 199 Cal. 661, 250 P. 657, text 659; *Hobbs v. Board of Ed.*, 126 Nev. 416, 253 N. W. 627, text 635-637.

The above and foregoing observations and authorities lead to an affirmative answer to the above question.

062-147—November 6, 1962'

EDUCATION

JUNIOR COLLEGES—CONTRACTS FOR PROVIDING FOOD SERVICES—CHS. 230 AND 413, F. S.

To: *Thomas D. Bailey, State Superintendent of Public Instruction, Tallahassee*

QUESTION:

May the county board operating a junior college under the provisions of §230.46, F. S., enter into a contract with an individual, a corporation or a state agency to operate a project to provide food or other services on the junior college campus?

I know of no prohibition, either statutory or by state board of education regulation, which would prevent a county school board from contracting for food or other services necessary to a junior college campus if in the discretion of the board such services could be provided more economically and efficiently on a contractual basis.

In my opinion a decision of this kind must be left to the discretion of the county school board which is charged by law with the responsibility of operating junior colleges under its jurisdiction and has legal authority to contract for necessary goods and services required for the proper operation of the schools (Ch. 230, F. S.). With regard to contracts for services with a state agency, you will note that Ch. 413, F. S., specifically authorizes the Florida council for the blind to assist blind persons to become self supporting by ". . . licensing and establishment of such persons as

operators of vending stands on *public property*," (emphasis supplied) which would of course include public junior colleges.

AGO 045-118 relating to a similar question is hereby withdrawn.

Your question is answered in the affirmative.

062-148—November 7, 1962

TAXATION

INTANGIBLE PERSONAL PROPERTY TAXES—CONTRACTS
FOR SALE OF REALTY—NO LIABILITY—CH. 199,
§§199.01, 201.08, F. S.; §1, ART. IX, STATE CONST.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Are agreements for the sale and conveyance of real property, providing that the said agreement "is not an obligation or commitment of the purchaser to pay the consideration therein mentioned to the seller," intangible personal property subject to taxation under Ch. 199, F. S.?

Prior to and at the time of the adoption of the 1924 amendment of §1, Art. IX, State Const., providing for the separate assessment and taxation of intangible personal property, §696, R.G.S. 1920, provided in part that the term "personal property" for the purposes of ad valorem taxation should be "construed to include . . . all debts due or to become due from solvent debtors, whether on account, contract, note or otherwise, all public stock or shares in all incorporated or unincorporated companies." After the said 1924 amendment to the Florida constitution, the legislature enacted, and the same became law, Ch. 15789, 1931, providing for the assessment, valuation and taxation of intangible personal property in this state. This chapter, for the purposes of taxation thereunder, defined "intangible personal property" as "all personal property which is not in itself intrinsically valuable but which derives its chief value from that which it represents." Said Ch. 15789, 1931, was replaced by Ch. 20724, 1941, which chapter was brought into the Florida Statutes as Ch. 199, F. S. Section 2 of said Ch. 20724, and §199.01, F. S., define intangible personal property, for the purposes of ad valorem taxation, as "all personal property which is not in itself intrinsically valuable but which derives its chief value from that which it represents."

Doubtless it was the legislative intent when said Chs. 15789 and 20724, 1931 and 1941, were adopted to expand the definition of the intangible personal property subject to taxation, as contained in said §696, R.G.S., 1920, and include other and additional intangibles, making all intangible personal property taxable in this state except such as were exempt under the statutes and laws of Florida and of the U. S. We note that the title to Ch. 15789 provided in part that it was "an act defining and classifying intangible personal property for the purposes of taxation;" the title to Ch. 20724 provided that it was "an act relating to taxation; defining and classifying intangible personal property for the purpose of taxation." Under the definitions of intangible personal property in each of said acts, "all personal property which is not in itself intrinsically valuable but which derives its chief value from that which it represents," having its situs in this state is subject to taxation in this state unless exempted by law. We reach the question of whether a written obligation to pay money from a

fund to be derived from a particular parcel or parcels of real property, the maker thereof and owner of the property encumbered not being liable by express contract provisions, is an intangible subject to taxation. Such a document would not be a written obligation to pay money under §201.08, F. S., under the opinion in *State ex rel. Weinberg v. Green*, Fla., 132 So. 2d 761.

The term "intangible property" is defined in Black's law dictionary as "such property as has no intrinsic and marketable value, but is merely the representative or evidence of value, such as certificates of stock, bonds, promissory notes and franchises." To the same effect see 73 C. J. S. 156, §5. This definition is substantially the same as §199.01, F. S., which defines intangible personal property as "all personal property which is not in itself intrinsically valuable but which derives its chief value from that which it represents." In *Re Plasterer's Estate*, 49 Wash. 2d 339, 301 P. 2d 539, it was held that the right to receive payments due under a contract for the sale of land is "intangible personal property." In *Maricopa County v. Trustees of Arizona Lodge*, 52 Ariz. 329, 80 P. 2d 955, text 957, it was held that obligations secured by mortgages on realty and personalty and conditional sales contracts were intangibles subject to taxation. In 84 C. J. S. 196, §79, the statement is made that "contracts for the sale of land, and the balance due thereunder, may be taxable as 'credits'." From these authorities it appears that the unpaid balance due on contracts for the sale and conveyance of real property is intangible personal property. In 51 Am. Jur. 446, §426, the statement is made that "by the great weight of authority the indebtedness created by a valid and enforceable contract for the sale of land, or an interest therein, where the seller agrees to sell and the buyer agrees to buy and pay the purchase price, is a taxable credit of the vendor and assessable to him, even though the contract also provides for forfeiture upon the default of the purchaser."

The supreme court of Wisconsin, in *Perrigo v. Milwaukee*, 92 Wis. 236, 65 N. W. 1025, text 1026, involved a contract to convey certain property to the city of Milwaukee, under a statute of 1891, which statute declared such contracts to not create a personal liability against the city. The laws of Wisconsin imposed a tax "on all debts due from solvent debtors"; the court held that the contract created no taxable debt against the city. To the same effect see also *Brenner v. Thomas*, 37 Kan. 282, 15 P. 211; *Read v. Lewis and Clark County*, 55 Mont. 412, 178 P. 177 and *Re Shields*, 134 Iowa 559, 111 N. W. 963, where contracts in the form of contracts for the sale and conveyance of real property were involved, with contract provisions relieving the purchaser or purchasers from personal liability. Although some of these agreements were construed to be options instead of contracts for the sale and conveyance of real property, in each case the court held that no taxable obligation or debt had been shown. These states appear to have each had statutory provision substantially the same as was provided in §696, R.G.S., 1920, imposing a tax on debts due or to become due from solvent debtors. We reach the conclusion that the contracts before us impose no "debts due or to become due from solvent debtors." Unless §199.01, F. S., be broader in its scope than was §696, R.G.S., our subject matter is not taxable. We are inclined to the view that §199.01 is broader in its scope than was said §696.

This brings us to the question of what is the value of a

contract to sell and convey real property on a time basis when such contract imposes no personal liability on the purchaser. In other words what would a willing purchaser, not required to purchase, pay for a contract to sell and convey real property when the contract imposes no personal liability on the purchaser of the real property described therein. In effect we have an agreement from a vendor to sell and convey real property to a vendee, which imposes on the vendee no personal liability to pay the consideration named in the contract for the purchase; and which merely charges the lands described with the payment of the consideration for the purchase. Such an instrument bears some relation to an option. Should the tax assessor from the evidence before him be able to fix a full cash value for the contracts, taking into consideration the non-liability of the purchaser, then the said contracts would be subject to taxation as intangible personal property at such value.

062-149—November 7, 1962

TAXATION

CLASS "C" INTANGIBLE PERSONAL PROPERTY TAXES— SUBSTITUTED NOTES AND MORTGAGES—CH. 201;

§§199.01, 201.08, 201.09, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

What class "C" intangible personal property taxes are payable where two promissory notes, secured by separate mortgages, are substituted in lieu of a single promissory note secured by a single mortgage encumbering the same real estate as is described in the said single mortgage, when the proper amount of class "C" intangible personal property taxes was paid at the time of the recording of the said single mortgage?

In AGO 062-139 of Oct. 23, 1962, rendered on the same statement of facts as are here involved, we held that for the purposes of Ch. 201, F. S., imposing documentary stamp taxes on certain described documents, including promissory notes, the two promissory notes substituted for the single promissory note were in law renewals of the said promissory note within the purview of §201.09, F. S., and for that reason not subject to any further documentary stamp taxes under §201.08, F. S.

Intangible personal property is defined in §199.01, F. S., as "personal property which is not in itself intrinsically valuable but which derives its chief value from that which it represents." This definition is substantially the same as that given in 73 C. J. S. 156, §5. In *Curry v. McCanless*, 307 U. S. 357, 59 S. Ct. 900, 123 A. L. R. 162, 83 L. Ed. 1339, text 1347, intangible personal property was referred to as "relationships between persons, natural or corporate, which the law recognizes by attaching to them certain sanctions enforceable in courts." "Where a negotiable instrument, such as a note or check, was given as evidence of, or as security for, a debt, and not as absolute payment thereof, the payee may, on nonpayment at maturity, sue on the original consideration. . . ." (10 C. J. S. 1155, §526; 8 Am. Jur. 75 and 536, §§340 and 914). In the light of these authorities it is evident that the original promissory note, as well as the two renewals, evidence the original obligation, so that suit may be brought either upon the original indebtedness or the note itself on default.

The two substituted promissory notes and mortgages, like the original promissory note and mortgage which they replaced, derive their chief value not from themselves but from the original indebtedness which they respectively represented. If class "C" intangible taxes were paid on the original promissory note, at the time of the recording of the mortgage or subsequently, no class "C" taxes are due on the substituted promissory notes and mortgages, as they represent the same indebtedness as did the original note and mortgage.

062-150—November 8, 1962

TAXATION

DOCUMENTARY STAMP TAXES—CONVEYANCE FROM THE STATE, COUNTY, MUNICIPALITY—CH. 201, §§201.01, 201.02, F. S.; CH. 15787, LAWS OF FLORIDA

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Are deeds of conveyance from the state, a county, a municipality, or other public agency to some person, firm or corporation subject to documentary stamp taxes under Ch. 201, F. S.?

Deeds of conveyance to lands within this state are taxable under §§201.01 and 201.02, F. S. Said §201.01 imposes the tax on any person "who makes, signs, executes, issues, sells, removes, consigns, assigns, or ships, or for whose benefit or use the same are made, signed, executed, issued, sold, removed, consigned, assigned or shipped in the state." (Emphasis supplied.) Under §201.02, F. S., the taxes are imposed at the rate of 20¢ on each \$100 of the consideration paid for the conveyance. These sections were derived, with subsequent amendments, from Ch. 15787, 1931, which act, at the time of its enactment in 1931, was substantially the same as §800 of the federal revenue act of 1926, in force and effect when said Ch. 15787 was adopted in 1931, which imposed a like tax on "any person who makes, signs, issues, sells, removes, consigns or ships the same or for whose use or benefit the same are made, signed, issued, sold, removed, consigned or shipped." See present §4384, title 26, U. S. code.

Section 801 of the said revenue act of 1926 provided that there shall not be taxed under this title any bond, note or other instrument, issued by the U. S., or by any foreign government, or by any state or local subdivision thereof. This exemption now appears in §4382, title 26, U. S. code. An examination of Ch. 201, F. S., fails to reveal any exemption like or similar to that contained in the federal statutes above mentioned. The statement is made in 82 C. J. S. 554 and 555, §317, that "the government, whether federal or state, and its agencies are not ordinarily considered as within the purview of a statute, however general and comprehensive the language may be, unless intention to include them is clearly manifest."

Applying the rule of statutory construction last above mentioned to Ch. 201, F. S., and especially §§201.01 and 201.02 thereof, we do not think that the state, a county, a municipal corporation, or their official agencies, would be liable for documentary stamp taxes under said sections as a person who makes, signs, issues, etc., a deed of conveyance; however, this would not seem to answer

the question of the liability of a grantee when not the state, a county, a municipal corporation, etc., in the light of the provision in said §§201.01 and 201.02 imposing a tax on those "for whose use or benefit the same (a deed of conveyance) is made, signed, issued, . . ." In opinions of April 10, 1936 and Sept. 1, 1936 (1935-1936 AGO 29 and 31) Attorney General Landis stated that it "appears that the duty to place Florida stamp taxes upon a deed . . . rests upon the grantor and upon the grantee." No authorities are cited in support of this conclusion. In *Granby Mercantile Co. v. Webster*, DC SC., 98 Fed. 604, text 605, which involved something in the nature of due bills to a business firm from its employees; these due bills were held by the court to be within the federal act. However, the tax had been collected from the business firm, which sued for a refund of the tax paid. The court held that the business firm was within the phrase "or for whose benefit the same shall be made, signed, issued, . . ." holding that it was liable for the tax as the one for whose benefit the due bill was made, although not the maker. Attorney General Landis may well have had this case before him when the said opinions of 1936 were prepared and issued.

In *Endler v. U. S.*, DC NJ., 110 Fed. Supp. 945, text 946, the court held a purchaser of real property from the U. S. liable for documentary stamp taxes thereon, on the theory that the vendee was the person "for whose use or benefit" the same was made. In *Home Title Ins. Co. v. Keith*, DC NY., 230 Fed. 905, 907, a grantee of a conveyance from a master in chancery, in a foreclosure proceeding was required to pay documentary stamp taxes on his deed as a condition to the recording of the same, whereupon he brought suit against the government for a refund of the tax on the theory that he was not liable for the payment of the said tax. The court, holding that the said grantee was the person for whose use or benefit the deed was made, denied the application for a refund. In *Amer. Express Co. v. Maynard*, 177 U. S. 404, 20 S. Ct. 695, 44 L. Ed. 823, a federal revenue act imposed a documentary stamp tax upon certain documents, including receipts issued by the express company, the same being imposed upon the party "who shall make, sign or issue the same, or for whose use or benefit the same shall be made, signed or issued." The court held that the said revenue act did not prohibit the express company passing on stamp taxes paid by it to its customers.

We note subsection (c) of federal tax regulation 43.4383-1, which provides that "where a state or political subdivision thereof, acting in its governmental capacity, is a party to a taxable transaction, under chapter 34 of the code, the transaction will not be exempt from the documentary stamp tax merely by reason of the governmental character of one of the parties. The legal incidence of the tax in such a case rests upon the other party to the transaction. . . ."

"The Florida documentary stamp tax act, Ch. 201, F. S., was taken largely from §800, et seq., of the federal revenue act of 1924, as amended in 1926 and 1928, 26 U. S. C. A., §§4301, et seq. Consequently, the decisions of this court have followed the federal decisions with respect to the imposition of the documentary stamp tax. . . ." (*Choctawhatchee Elec. Coop., Inc. v. Green*, Fla., 132 So. 2d 556, text 558; *Gay v. Inter-County Tel. and Tel. Co.*, Fla., 60 So. 2d 22, text 23; *State v. Cook*, 108 Fla. 157, 146 So. 223, Text 224).

In the light of the above and foregoing authorities, and especially *Endler v. U. S.*, supra, holding the purchaser of real property from the U. S. liable for the federal tax, we feel that we should answer the above question in the affirmative.

062-151—November 8, 1962

SCHOOL CODE
TEACHERS' RETIREMENT SYSTEM—CUBAN EXILES EM-
PLOYED AS TEMPORARY TEACHERS OR TEACHERS'
AIDES—CH. 238, F. S.

To: Thomas D. Bailey, State Superintendent of Public Instruction, Tallahassee

QUESTIONS:

1. May the board of public instruction of Dade county, provide for retirement coverage for alien Cuban teachers' aides employed by said board under the state and county officers and employees' retirement system?

2. Must the board of public instruction of Dade county, provide for retirement coverage for alien Cuban teachers' aides employed by said board under the state and county officers and employees' retirement system?

It is my understanding that Cuban exiles who subscribe to the principles of the U. S. constitution and our form of government are issued temporary teaching certificates in Florida and are employed in many cases as temporary teachers or teachers' aides.

I am also advised that "teachers' aides" are considered instructional personnel by virtue of the nature of their duties.

Chapter 238, F. S., provides a retirement system for teachers. The definition of "teacher" in said chapter would appear to include teachers' aides who have been issued temporary teaching certificates and whose duties are predominantly instructional in nature.

Teachers' aides, therefore, Cuban exiles or otherwise, who hold temporary teaching certificates and are full time employees are eligible for retirement benefits under Ch. 238, F. S. (teachers retirement act).

Such employees do not appear to be eligible for membership in the state and county officers and employees retirement system.

Both questions 1 and 2 are therefore answered in the negative. In other words, teachers in this category should be admitted to membership in the state teachers retirement system rather than the state and county officers and employees retirement system.

062-152—November 8, 1962

TAXATION
POWERS OF TAX ASSESSOR OVER THE TAX ROLL
AFTER DELIVERY TO THE TAX COLLECTOR—
§192.21, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTIONS:

1. What jurisdiction does the county assessor of taxes have over the county tax assessment roll after its equalization by the county board of equalization and delivery to the tax collector?

2. What effect, if any, should the county tax collector give to an item in the county tax assessment roll changed or altered by the tax assessor after equalization and delivery to the said tax collector?

The supreme court in *Sparkman v. State*, 71 Fla. 210, 71 So. 34, text 41, held that the county tax roll upon the completion of its equalization by the county board of tax equalization (the board of county commissioners) became final and not subject to change by the county taxing officials. Subsequent to the court's opinion in the *Sparkman* case (Feb. 15, 1916) the Florida legislature enacted Ch. 10040, 1925, providing that "no act of omission or commission on the part of any tax assessor, or any assistant tax assessor, or any tax collector, or any board of county commissioners . . . shall operate to defeat the payment of said taxes; but any such acts of omission or commission may be corrected at any time by the officer or party responsible for the same in like manner as is now or may hereafter be provided by law for performing such acts in the first place, . . ." Chapter 10040, 1925, now appears, with amendments and extensions, as §192.21, F. S.

This office by its opinion 061-92, of June 2, 1961, held that such errors of omission or commission may be corrected at any time, even after the equalization of the tax roll and its delivery to the tax collector, provided applicable statutes are complied with; for instance, where the tax assessor has included the value of a building in his valuation of one lot when in fact the building is not located upon that lot but upon another one, provided such correction is made prior to the payment of the taxes assessed and levied. Errors made in extending the aggregate amount of taxes on the assessed valuation of a taxable item would also appear to be errors of omission or commission. Where a change in the assessed valuation of a parcel of land is made because of an error of omission or commission the same must be referred to the board of county commissioners for equalization after due notice to the taxpayer. Any such corrections by the tax assessor must be reported to the board of county commissioners for their consideration.

After the tax roll has been equalized and the taxes extended and the roll has been delivered to the tax collector, no changes made by the tax assessor after equalization should be deemed valid unless reported to the board of county commissioners and approved by them, where there is any change in the assessed value of the assessed items of taxable property. It appears from your file, handed us with your request for opinion, that after the equalization of the tax roll and the extension of taxes, changes were made by the county assessor of taxes in the valuations of some six items of taxable real property aggregating some \$29,115.94 in valuation reductions. Such a reduction would be invalid, unless reported to the board of county commissioners with due and adequate evidence of errors of omission and commission on the part of the tax assessor when the valuations were originally fixed by the assessor. Reduction in the valuation of one or more parcels of real estate by the board of equalization, with which the tax assessor did not agree, is no valid reason for the county assessor of taxes making other reductions in valuation on the tax roll. Any such change should be deemed and held to

be invalid unless and until proof of an error of omission or commission in fixing the assessed valuations in the first instance is furnished the board of tax equalization and entered on the tax roll.

In conclusion we hold:

1. A county assessor of taxes has no jurisdiction or authority over the tax roll, after equalization and delivery to the tax collector, except to correct errors of omission and commission, under the rules above mentioned and referred to in AGO 061-92, of June 2, 1961.

2. The county tax collector should not recognize any changes or alterations in a tax roll, especially those relating to tax valuations, made by a county assessor of taxes, except those relating to errors of omission and commission, and then only when such errors of omission and commission are clearly made to appear by the county assessor of taxes.

3. Where the original valuations, as approved by the board of tax equalizations, are apparent or known to the tax collector, he should change the tax roll to conform to the roll as equalized, duly advising the board of county commissioners of the making of such changes, and make collections according to the tax roll as equalized and changed as aforesaid.

062-153—November 15, 1962

FLORIDA LEGISLATIVE COUNCIL
CONSTRUCTION OF §11.21(2), F. S.; FILLING OF VACANCIES
—§11.21(1), F. S.

To: *David V. Kerns, Director, Florida Legislative Council, Tallahassee*

QUESTION:

Where a vacancy in the Florida legislative council occurs between the general election and the next regular session of the state legislature thereafter, by whom should such vacancy be filled when an extra session of the legislature intervenes?

Subsection (2) of §11.21, F. S., provides that:

In the event of a vacancy occurring in the council, the same shall be filled as provided for original appointments, except that such vacancy occurring or continuing after any general election shall be filled by a majority of the remaining members of the legislative council as a whole.

Under §11.21(1), F. S., the legislative council is comprised of the president of the senate and speaker of the house of representatives of the state, and two members, one appointed by the president of the senate and one by the speaker of the house, from each of the eight congressional districts of Florida as they existed on Jan. 1, 1960, totaling 16 appointed members and two ex officio members. There existed vacancies in the membership of the council when the Florida legislature was convened in extraordinary session on Nov. 9, 1962, and organized, selecting and electing a president of the senate and a speaker of the house of representatives. The terms of the present members of the house of representatives and half of the present members of the senate began at the close of the general election held Nov. 6, 1962.

Section 11.21(2), F. S., evidences a clear legislative intent and purpose that members of the legislative council be selected and appointed by the president of the senate and speaker of the house of representatives, so long as they are serving in that capacity until the election of a new slate of members of the house and half of the members of the senate. From the time of their selection as president of the senate and speaker of the house of representatives, until the election of successors as aforesaid, the president of the senate and speaker of the house of representatives select and fill vacancies in the membership of the legislative council. Section 11.21(2), F. S., provides for the filling of vacancies in the legislative council by the remaining members of the council during that period of time when the house and half of the senate are composed of newly elected members and no legislative organization, which condition usually extends until the organization of the house and senate in April following the general election. By reason of the convening of the legislature in extraordinary session on Nov. 9, 1962, and its organization by the selection of the new president of the senate and speaker of the house of representatives, there is now a duly elected president of the senate and a speaker of the house of representatives selected by the newly organized senate and house of representatives. A president of the senate was nominated and elected to "serve until a successor is elected at the 1965 regular session of the legislature." President of the Senate Hodges having resigned his office as president, but not as senator (see senate journal of Nov. 9, 1962). The house of representatives also nominated and elected a "speaker of the house of representatives." (House journal of Nov. 9, 1962).

With the selection of permanent officers for the senate and house at the extraordinary session held beginning Nov. 9, 1962, the conditions justifying the filling of vacancies by the membership of the council seem to have lost existence. There is now a president of the senate and a speaker of the house of representatives qualified and able to act. The supreme court, in *State v. McDonald*, 154 Fla. 456, 18 So. 2d 16, text 19, held that the power of the governor to suspend an officer, under §15, Art. IV, State Const., "exists only between sessions of the senate and not during the period the senate is in session; the governor is without power to suspend but can recommend to the senate (while it is in session) the permanent removal of such officer." It is our view that the intent and purpose of the legislature when it adopted §11.21(2), F. S., was to make provision for the filling of vacancies in the office of members of the legislative council by the remaining members of the said council only when there are no duly elected and qualified president of the senate and speaker of the house of representatives.

Where a vacancy in the Florida legislative council occurs between the general election and the next regular session of the state legislature thereafter, such vacancies should be filled by the remaining members pursuant to said §11.21(2), only so long as there remains no duly elected president of the senate and speaker of the house of representatives, however, when such offices are filled, even at an extraordinary session of the legislature, vacancies should be filled by such president and speaker.

062-154—November 16, 1962

TAXATION

TAX ON GASOLINE AND LIKE PRODUCTS—PAYMENT BY MANUFACTURERS, DISTRIBUTORS AND DEALERS ON SALES—§208.04, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

On what sales and transfers of gasoline and like products made within this state are the taxes imposed by §208.04, F. S., to be determined and calculated?

Although §208.04, F. S., expressly purports to levy the tax thereby imposed "upon the consumer" said section was construed by the supreme court of Florida, in *U. S. v. Lee*, 153 Fla. 94, 13 So. 2d 919, text 921, to be a tax upon the manufacturer, distributor or dealer making the first sale or transfer within the state of Florida. In this case the court remarked that:

It is quite true that this court has not said in terms that the tax in question is not a tax on the consumer, but in *Orange State Oil Co. v. Amos*, 100 Fla. 884, 130 So. 707, we held it to be an excise tax upon the privilege of selling gasoline.

In the *Orange State Oil Co. v. Amos* case (So. text 709) the court remarked that "in *Amos v. Matthews*, 126 So. 308, and in *Amos v. Gunn*, 84 Fla. 285, 94 So. 615, we held that this tax is an excise tax upon the privilege of selling gasoline." Under §208.04 (1), the tax is to be "paid upon the first sale or transfer within this state whether by distributor or dealer," subject however, to the provisions of §208.04(2), which makes provision for the licensing of certain distributors who are permitted to purchase gasoline from manufacturers and distributors and pay the tax upon the first sale or transfer made by them after purchase from the manufacturer or distributor who imports such gasoline and like products into this state.

From the above and foregoing it is clear that Florida gasoline and like products taxes are due and payable by the manufacturer or distributor making the first sale or transfer in this state after the same comes into this state or is manufactured in this state, except as to those distributors licensed under §208.04(2), F. S., who pay the tax upon the first sale or transfer made by them, not upon the sale or transfer to them. Distributors of gasoline and like products, licensed under and pursuant to §208.04(2), F. S., should pay a tax upon the gasoline and like products sold not upon their purchases. The tax is measured by their sales of gasoline and like products, not their purchases or receipts of gasoline and like products.

Taxes on the sales and transfers of gasoline and like products are determined by the sales and transfers made within the state by manufacturers, distributors, and dealers, except as to those distributors licensed under §208.04(2), whose taxes are measured by their sales of gasoline and like products, not their purchases or receipts of such gasoline and like products.

062-155—November 16, 1962

CRIMES

LOTTERY—ELEMENTS; MERCHANT'S WORD CONTEST— §23, ART. III, STATE CONST.; §849.09, F. S.

To: *Arthur L. Steed, State Attorney, Orlando*

QUESTION:

Does a plan whereby merchants place a word puzzle contest in a newspaper alongside the advertisement of such merchants' products, violate the lottery laws of this state when such puzzle contest provides for the awarding of a prize to those who furnish a correct solution to the puzzle?

From the sample word puzzle which you have submitted with your letter, the following has been determined.

The puzzle is of the unfinished word type wherein one letter is omitted and such letter must be inserted in order to complete the word. The puzzle is not of the usual cross-word type variety because the letters which must be supplied by the contestants are only used to complete one word. Alongside the puzzle are sentence clues and such sentence clues indicate the two possible choices of letters which may be supplied in any particular blank so as to complete such word. The contestant must decide which of the words formed by either of the two letters given would be most acceptable in the sentence provided as a clue. A sample sentence is "An elderly actor often looks back fondly on the days when he star-ed in the theatre (r or t)." The contestants must, through their analytical ability, decide which of the two possible words, starred or started, best completes the sentence in a logical manner. The correct solution and correct analysis are subsequently published.

Article III, §23, State Const., and §849.09, F. S., prohibit the operation of lotteries in this state.

A lottery involves three elements, viz: (1) an award by chance, (2) a prize, and (3) a consideration.

The element of prize is explicit in the above-described scheme. It would appear, however, that the awarding of the prize is dependent, predominantly, upon skill rather than chance. This office has indicated that limerick contests and certain question-answer contests are so predominantly dependent upon skill rather than chance that the schemes in which such contests were involved did not violate the lottery laws of this state. See AGO 057-356, Nov. 13, 1957 and AGO 054-213, 1953-54 biennial reports, p. 661.

It would appear that the puzzle contest enclosed with your letter exercises the contestants' analytical skill to such an extent that this analytical skill will determine the winner rather than any contestant's particular luck.

This particular contest requires that the contestants choose between two words to determine which of such words completes a sentence in the most logical manner. An initial impression would indicate to the contestants that either of the two words are acceptable. However, a thorough analysis will reveal that one word is more desirable than the other. Of course, if the contestant is allowed to submit several different entries, the contestant is not required to exercise his skill in order to win but

may, instead, change his entries so as to cover all or most of the situations. Therefore, if this particular scheme is not to be of a questionable nature, each contestant should be allowed to submit one entry only. Also, if the number of sentences required to be analyzed was a minimum, luck would be a predominant factor. However, such circumstance is not present wherein as in the sample puzzle, there are 26 sentences. With 26 sentences, the chance of *guessing* all the correct answers is so minute that clearly the skillful contestant is well favored.

The determination that this particular contest involves predominantly skill rather than chance is based somewhat on personal judgment. However, this office has tacitly made such determination in the past by sanctioning those puzzles conducted by Florida newspapers which have been similar, if not identical in nature, to the one analyzed by this opinion. This particular word-puzzle contest contains an element of skill essentially similar to the question and answer skills discussed in AGO 058-128. In this word-puzzle contest, the contestant is required to answer the question which words complete certain sentences in the most logical manner.

If the characteristics of the word-puzzle contest are changed so as to be beyond the comprehension and capacity of the general public or in such a manner so as to create a guessing game rather than one in which skill and judgment predominate, then the rationale of this opinion would not be applicable. If the texture of the word-puzzle contest is materially changed, such change would require further consideration as to whether this contest was legal. The sponsor is cautioned not to make the distinctions in the puzzle so fine as to result in the majority of the contestants submitting guesses rather than judgments, nor must the distinctions be so easy as to make the answers obvious.

062-156—November 21, 1962

TAXATION

INDIAN RESERVATION—OPERATION OF DRIVE-IN THEATRE ON; LICENSES AND LICENSE TAXES— §§285.01, 285.03, F. S.

To: Ray E. Green, State Comptroller, Tallahassee

QUESTION:

Are the operators of drive-in theatres, open to the general public, operated on lands leased from the Seminole tribe of Indians in Florida, with the consent and approval of the secretary of the interior of the U. S., liable for the payment of state and county occupational license taxes?

The leased lands appear to be a part of the Seminole Indian reservation and were leased to the operator of the drive-in theatre by the Seminole tribe in Florida with the approval of the secretary of the interior or his authorized representative. A Seminole Indian reservation of lands in Florida was recognized by an act of congress approved July 20, 1956, Ch. 645, 70 Stat. 581, which act declared the said lands to be "held in trust for the Seminole tribe of Indians in the state of Florida" under the authority of the U. S. There exists, largely in Broward county, under §285.01 and §285.03, F. S., state Indian reservations. Under

the federal statutes the title to Indian reservations appears to be vested in the secretary of the interior of the U. S. in trust for the Seminole tribe of Indians in Florida; under the Florida Statutes, the title to state Indian reservations is vested in the board of commissioners of state institutions in trust for the Seminole tribe of Indians in Florida.

The U. S., as did England, France, and Spain, has treated and considered the organized Indian tribes and nations of the U.S. as distinct political communities so long as the tribal relation is preserved, and they have been uniformly so treated since the settlement of this country by the whites. (27 Am. Jur. 545 and 546, §6). In *Roff v. Burney*, 168 U. S. 218, 18 S. Ct. 60, 42 L. Ed. 442, text 443, it was stated that Indian tribes, "though in certain respects regarded as possessing the attributes of nationality, are held not to be foreign but domestic dependent nations." "Until 1871 Indian tribes were recognized by the United States as possessing the attributes of nations to the extent that treaties were made with them." (27 Am. Jur. 547, §9). It has long been the theory in this country "that Indian tribes are distinct political societies." Such tribes have been recognized "as having the right to make laws and regulations for the government and protection of their persons and property," so long as such laws are "not inconsistent with the federal constitution and laws." The duration of such right of self government appears to be at the discretion of the federal government through congress. (27 Am. Jur. 547, §7). Upon the question of the status of Indian nations and Indian tribes residing on Indian reservations see AGO 060-22 of Jan. 29, 1960 (1959-1960 AGO 470).

The statement is made in 42 C. J. S. 665, §12, that an Indian "tribe has the ordinary power of taxation over persons and property within its limits. It may require a license before permitting noncitizens to engage in business or in the practice of a profession within its territorial limits." Supporting this rule see *Iron Crow v. Oglala Sioux Tribe of Pine Ridge Reservation*, CCA 8th, 231 Fed. 2d 89, text 98; *Buster v. Wright*, CCA 8th, 68 CCA 505, 135 Fed. 947, text 955 (Appeal dismissed 203 U. S. 599, 27 S. Ct. 777, 51 L. Ed. 334); *Zevely v. Weininger*, 5 Ind. T. 646, 82 S. W. 941; *Maxey v. Wright*, 3 Ind. T. 7, 54 S. W. 807. The statement is made in *Cohen's Handbook on Federal Law* 142, that "one of the powers essential to the maintenance of any government is the power to levy taxes. That this power is an inherent attribute of the tribal sovereignty which continues unless withdrawn or limited by treaty or act of congress is a proposition which has never been successfully disputed." In *Morris v. Hitchcock*, 194 U. S. 384, 24 S. Ct. 712, 48 L. Ed. 1030, the U. S. supreme court upheld an act of the "legislature of the Chickasaw nation" imposing a license fee on non-Indians grazing stock on the Chickasaw reservation. This act was copied in the court's opinion and is in form substantially the same as an act of the Florida legislature. The old Cherokee Indian nation is stated to have adopted and maintained a constitution like and similar to state and federal constitutions, and to have maintained courts of record.

Having determined that Indian tribes maintaining a tribal organization on Indian reservations have the power to impose taxes and license fees upon businesses, occupations and professions carried on upon the reservation, we come next to the authority of the state wherein the reservation is located to like-

wise impose taxes and license fees on the same businesses, occupations and professions. The state of Oklahoma by statute imposed a tax on the gross value of petroleum produced within the state. In *Oklahoma Tax Commission v. Texas Co.*, 336 U. S. 342, 69 S. Ct. 561, 93 L. Ed. 721, this statute was upheld on an imposition of the tax to petroleum taken under lease from allotted and restricted Indian lands. This opinion overruled an adverse line of prior opinion of the supreme court of the U. S. In 42 C. J. S. 820, §89, it is stated that "it is generally held that property of all persons within the limits of a (Indian) reservation, except that of Indians, is subject to taxation by the state." Although Indian reservations and the Indian property thereon are exempt from state taxation (51 Am. Jur. 289, §229), private property of other than Indians on Indian reservations is subject to local and state taxation (51 Am. Jur. 293, §235). See also 51 Am. Jur. 294, §238. Except for the property of the Indian reservation and of the Indians themselves, there appears to be no prohibition against the taxation of property and businesses of non-Indians on an Indian reservation.

The above stated question is answered in the affirmative. This is true even where the Indian tribe imposes a like license tax.

062-157—November 21, 1962

TAXATION
DOCUMENTARY STAMP TAXES—ASSUMPTION AGREEMENTS IN CONVEYANCE AND SEPARATELY—
§§201.02, 201.08, F. S.

To: *Ray E. Green, State Comptroller, Tallahassee*

QUESTION:

Where the grantor of real property pays documentary stamp taxes, under §201.02, F. S., measured by the consideration passing from the grantee to him, plus the unpaid balance of any mortgage indebtedness encumbering the property assumed by the grantee under a covenant in the conveyance, or presumed to have been assumed under AGO 062-35 of Feb. 26, 1962, are there additional documentary stamp taxes due under §201.02, F. S., where the grantee, or someone claiming by, through, or under him, by specific written agreement with the holder of the mortgage indebtedness or other interested party, assumes and agrees to pay the same mortgage indebtedness?

Section 201.02, F. S., imposes a documentary stamp tax "on deeds, instruments, or writings, whereby any lands, tenements, or other realty, or any interest therein, shall be granted, assigned, transferred, or otherwise conveyed to or vested in the purchaser, or any other person by his direction, . . ." at the rate of 20¢ "for each one hundred dollars, . . . of the consideration therefor." It has been held by this office that where a purchaser of property assumes and agrees to pay a mortgage indebtedness encumbering the property purchased, such assumption and promise to pay becomes and is a part of the consideration paid for the property under said §201.02, F. S. Further, this office by its opinion 062-35 of Feb. 26, 1962, held that when real property is purchased subject to an outstanding mortgage encumbering the property sold that a presumption is raised by the transaction that the purchaser assumed and agreed to pay the said outstanding mortgage indebted-

edness, and that the amount of the said mortgage indebtedness presumptively becomes a part of the consideration for the lands purchased. These presumptions have been complied with, insofar as the seller and purchaser of the property in question are concerned. The documentary stamp taxes have been paid on the consideration measured as aforesaid.

The question posed in the light of other and subsequent agreements made by the purchaser and those claiming by, through and under him, with third parties, including the person holding the mortgage indebtedness encumbering the property, whereby, in addition to the assumption of the indebtedness by the purchaser in favor of the seller, other assumptions of the same indebtedness are made. These other and additional assumptions of the mortgage indebtedness in no way increase the consideration passing from the purchaser to the seller; such assumptions may increase the security for the payment of the consideration for the conveyance, but they do not increase or reduce that consideration for the sale and purchase of the property in question. The number of sureties on a promissory note will not increase the obligation of the said note, although they may better insure its payment.

The above stated question is answered in the negative, the documentary stamp taxes being measured by the consideration for the conveyance agreed on, by and between the seller and the purchaser, and not by the assumptions of the indebtedness by others. The several assumptions and agreements to pay the mortgage indebtedness each relate to the same obligation.

Assuming that the mortgage indebtedness secured by the mortgage encumbering the lands described was in the form of a promissory note or other written obligation to pay money, within §201.08, F. S., and that the documentary stamp taxes measured by the obligation were paid by or for the maker thereof, the assumptions of the said indebtedness would in no way increase the said obligation, and would be in the nature of additional security for its payment. Suppose "A" makes and executes a promissory note to "B," with "C," "D," and "E" as sureties or warrantors thereon, there would be but a single written obligation to pay money. Even a joint and several note signed by two makers, although each maker is liable for the face amount of the note, is but a single written obligation. The written assumptions to assume the payment of the mortgage indebtedness are secondary obligations and relate to but one written obligation to pay money; that is, the mortgage indebtedness. If the documentary stamp taxes were duly paid on the original written obligation to pay money, secured by the mortgage, no further stamp taxes would be required of the persons making the assumptions as aforesaid under §201.08, F. S.

062-158—November 28, 1962

**COUNTY PUBLIC SCHOOL SYSTEM
USE OF MINIMUM FOUNDATION FUNDS — TRANSPORTATION
CONTRACTS WITH QUASI-PUBLIC CORPORATION
—DADE COUNTY — §§234.07, 234.08, F. S.**

To: *Thomas D. Bailey, State Superintendent of Public Instruction,
Tallahassee*

QUESTION:

May the board of public instruction of Dade county

qualify for minimum foundation funds for transportation while contracting with another "quasi-public corporation" (e.g., Dade county) to have that other corporation furnish transportation for students?

Section 234.07, F. S., provides:

General requirements for equipment.—All transportation equipment shall be of such construction as to provide for safe, comfortable, and economical transportation of passengers. Equipment which is used to transport nine or more public school pupils at one time shall be constructed, maintained, and operated in accordance with all requirements of law and regulations of the state board relating to school buses.

Section 234.08, F. S., provides, in part:

School buses.—School buses shall be defined as set forth below and shall meet specifications as follows:

(1) *DEFINITION.*—For the purpose of the school code, a school bus is defined as a motor vehicle regularly used for the transportation of pupils of the public schools to and from school or to and from school activities, and owned, operated, rented, or leased by any county board, excepting motor vehicles of the type commonly called pleasure cars and carrying eight pupils or less; and *excepting motor vehicles subject to and meeting all requirements of the state railroad commission and operated by carriers operating under the jurisdiction of the state railroad commission but not used exclusively for the transportation of public school pupils.* (Emphasis supplied.)

In my opinion a county school board may legally contract for pupil transportation with either an individual, private corporation, or a quasi-public corporation, provided the above quoted statutory provisions are complied with as well as other related sections of the school code dealing with safety and purchasing procedures.

Subject to the above, your question is answered in the affirmative.

062-159—December 3, 1962

COUNTY PUBLIC SCHOOL SYSTEM

COUNTY INSTRUCTIONAL PERSONNEL — SICK LEAVE —
DETERMINATION OF ACCUMULATION — §231.40(1), F. S.

To: Thomas D. Bailey, State Superintendent of Public Instruction,
Tallahassee

QUESTIONS:

1. Is sick leave, as provided under §231.40 (1), F. S., cumulative up to 120 days provided that not more than 80 days of such leave, including leave for the current year, is claimed in any one year? In other words, if a teacher has rendered 12 years of successive service in a county, would she have an accumulation of 120 days sick leave?

2. If the answer to question 1 will permit a teacher to accumulate 120 days sick leave, please consider the following:

(a) If a teacher in her 12th year of successive service in a county has an accumulation of 120 days sick

leave and uses 80 days during the current year (12th year), would she then have 40 days accumulated sick leave plus 10 days current leave or a total of 50 days with the beginning of the next school term?

(b) If a teacher in her 30th year of successive service in a county has an accumulation of 120 days of sick leave and uses 80 days during the current year (13th year), would she then have accumulative sick leave of 50 days plus 10 days current leave or a total of 60 days with the beginning of the next school term?

Section 231.40 (1), F. S., provides:

EXTENT OF LEAVE.—Each member of the instructional staff shall be entitled to *not more than 10 days* of sick leave during any one school year; provided, that such leave shall be taken only when necessary because of sickness as herein prescribed. Such sick leave shall be cumulative from year to year; provided, that *not more than 80 school days sick leave*, including sick leave for the current year and accumulated sick leave for previous years *may be claimed in any one year*; and provided, that *unused sick leave credit for any year may not be claimed later than the end of the 12th year thereafter*; and provided, further, that at least half of this cumulative leave must be established within the same county school system. County school boards of the several counties may establish policies which will allow a teacher two days in each year for religious holidays; provided, that the use by the teacher of such days for religious holidays shall be charged to the sick leave provided for herein; and provided, further, that leave for religious holidays shall be noncumulative. (Emphasis supplied.)

This act provides, in effect, that county school boards *may* adopt policies giving teachers sick leave up to a maximum of 10 days each school year.

The act provides further a limitation on the number of days sick leave which may be used in any one year to 80 school days, including sick leave for the current year.

The act further provides by implication that sick leave accumulated during prior service in other county school systems *may* be credited by the board to the teacher provided that *at least half* of this cumulative leave must be established within the *same county school system*.

Although this language may appear to be ambiguous, it is my opinion that the intent of the act is to the effect that the teacher must have established at least half of her cumulative leave in the county school system in which she is currently working.

Still another provision in §231.40 (1), F. S., appears to be somewhat ambiguous in that it authorizes county school boards to grant two days each year of leave for religious holidays. According to the act, if this leave is used it is charged against the teacher's authorized sick leave and the act also provides that leave for religious holidays shall be noncumulative.

This provision might be construed to mean that in a county which has adopted a policy of allowing two days leave for religious holidays, said two days, if not used, could not be counted as accumulated sick leave.

I do not believe that this was the intent of the legislature,

however. It is my opinion that the two days religious holiday leave which may be permitted could not accumulate so as to allow the teacher to take four days religious holiday leave during her second year of service or six days during her third year, etc. It is my opinion that if the teacher does not use the two days religious holiday leave which may be allowed by the board policy, the said two days should not be deducted from her accumulated sick leave.

For all practical purposes it must be assumed that authorized sick leave accrues at the beginning of the school year rather than at the end or somewhere in between, since the statute is silent on this point. It is also clear that sick leave is not authorized unless the teacher is really sick.

The total number of days of accumulated sick leave depends on several factors, including (1) the county school board's policy as to how many days of sick leave it will allow for each year up to the maximum of 10 days authorized by law, and (2) the number of days of accumulated sick leave earned by the teacher in other county school systems which may be credited under the policy of the school board in the county in which the teacher is currently employed.

With regard to your specific questions:

Since the unused 10 days of sick leave for any year cannot be claimed later than the end of the 12th year thereafter, it follows that no more than a maximum of 120 days sick leave can ever be accumulated by a teacher. If a teacher has accumulated 120 days of unused sick leave and uses 80 days thereof in her 12th teaching year or in any subsequent year, this would leave her 40 unused days to carry over into the next year. The 80 days used would represent the accumulation of sick leave of her oldest eight years of service of the 12 in which her 120 days of unused sick leave were earned. The result is that under your questions, in any year after 120 days of sick leave have been earned and are eligible for use, if 80 days are used, 40 days will be carried over into the next year, which added to the 10 days leave allowed for said next year would give the teacher 50 days on that year.

062-160—December 13, 1962

STATE OFFICERS AND EMPLOYEES
APPLICATION OF §112.061, F. S., TO OFFICERS AND EMPLOYEES OF THE CANAL AUTHORITY OF FLORIDA

To: The Canal Authority of Florida, Jacksonville

QUESTION:

Are the officers and employees of the canal authority of the state within the purview and operation of §112.061, F. S., and if so are there any exceptions?

Section 112.061, F. S., insofar as here material, provides that "state officers and employees . . . when traveling within the state on state business shall be allowed subsistence of eleven dollars per diem . . . when traveling on state business without the state may be allowed a subsistence of twelve dollars and fifty cents per diem. . . ." In addition to such subsistence allowances such officers and employees are allowed mileage of 10¢ per mile when traveling by private motor vehicle or their fare when traveling by public conveyance.

The first general provision providing per diem and travel expenses for state officers and employees appears to have been §1, Ch. 16184, 1933, which was brought into the Florida Statutes, 1933, as §112.06 thereof. Here the allowance was a per diem not exceeding \$4.50 per day and mileage at the rate of 5¢ per mile. Chapter 21913, 1943, amended said §112.06, so as to provide for a per diem of \$6 per day, instead of the \$4.50; this act also provided that it would expire June 30, 1945. Original acts were passed in 1947, 1949 and 1951, each expressly providing for its expiration at the end of the next biennium. Although the said 1951 act provided for its expiration on July 30, 1953, subsequent acts appear to have treated it as a continuing act or law (see Chs. 28303, 29628, 57-230, 61-43 and 61-183, 1953, 1955, 1957 and 1961), it now appearing as §112.061, F. S.

Section 112.061, F. S., contains no express provision exempting any specific state officer, agent, employee or otherwise from its operation and effect. It is expressly provided in §550.03, F. S., relating to pari-mutuel pools and their regulation, that "the provisions of §112.061, shall be inapplicable" to the officers and employees of the state racing commission. There may be other like and similar statutory provisions; however, we find nothing in the Florida Statutes or other general laws expressly exempting the canal authority of the state, formerly the ship canal authority of the state, or its officers and employees from the operation and effect of said §112.061, F. S. This brings us to the question of the nature and status of the said canal authority of the state, and whether or not its officers and employees are in law officers and employees of the state and within the purview of said §112.061, F. S.

Section 1, Ch. 61-244, provides that "there is hereby created a body corporate, with the name 'the canal authority of the state of Florida' which shall operate under the supervision of the board of conservation." This body corporate was formerly referred to as the ship canal authority of the state by §1, Ch. 16176, 1933, and referred to as a body corporate. The administration of the affairs of the said corporation is under a board of five directors "appointed by the governor" of the state (§2, Ch. 16176, 1933) which operates "under the supervision of the board of conservation" of the said state (§1, Ch. 61-244), which board is composed of the governor of Florida and the cabinet members of the state. The said canal authority of the state appears to be a public corporation. "Public corporations are those which are exclusively instruments of the public interest" (Bouvier's Law Dict., 3rd Rev., p. 683); "a corporation is public if it is created for public purposes only. In other words, a public corporation is one 'connected with the administration of the government, and the interests and franchises of which are the exclusive property and domain of the government itself.'" (Miller v. Davis, 136 Tex. 299, 150 S. W. 2d 973, text 978, 136 A. L. R. 177). "A corporation is public when created for public purposes only, connected with the administration of government, and where the whole interest and franchises are the exclusive property and domain of the government itself." (Forbes Pioneer Boat Line v. Board of Comm., 77 Fla. 742, 82 So. 346, text 350). See also County Comm. v. King, 13 Fla. 451, text 470 and State v. Knowles, 16 Fla. 577, text 593; Black's Law Dict., 4th Ed., p. 409; 13 Am. Jur. 171, text 17; 18 C. J. S. 394, §18; 35 Words and Phrases, Perm. Ed. 74, et seq.

In *Forbes Pioneer Boat Line v. Board of Commissioners*, supra, the court deemed the Everglades drainage district and its governing board to be "a public quasi corporation, and, as such, a governmental agency of the state for certain definite purposes, having such authority only as is delegated to it by law." The canal authority of the state appears to be a public corporation or public quasi corporation designed as a governmental agency to execute the powers and authority set out in §5, Ch. 16176, 1933, as amended by §2, Ch. 61-244. Any canals established and constructed by the said authority will be property and domain of the state. Legally there is little if any distinction between the canal authority of the state and the board of commissioners of the Everglades drainage district involved in *Forbes Pioneer Boat Line v. Board of Commissioners*, supra. In *Arundel Corp. v. Griffin*, 89 Fla. 128, 103 So. 422, text 423, the court referred to the board of commissioners of the Everglades drainage district as "an agency of the state" whose statutory authority "is exercised for the state."

In the above *Arundel Corp.* case it is recited that statute creating the Everglades drainage district provided that the said district was vested "with all the powers of a body corporate, including the power to sue and be sued by said name in any court of law or equity." This was held that "this does not render the board liable in tort for damages, since the board is a state agency acting only for the state." Section 112.061, F. S., fixed the per diem and travel allowance for "state officers and employees" when traveling on state business. Reference is made in this section to "the head or heads of any governing agency, office, department or any board or commission" of the state, who are authorized to, in their discretion, reduce the per diem allowance. It seems clear from the above and foregoing that the canal authority of the state is an agency of the state. Its operation since the 1961 amendment of its laws is statewide, and not limited to any specified area or district.

Under §122.02, F. S., for the purposes of the state and county officers and employees retirement system full-time officers and employees who "receive compensation for employment or service from any agency, branch, department, institution or board of the state . . . for services rendered the state . . . from funds from any source regardless of whether the same is paid by state . . . warrant or not . . ." are deemed state officers or employees. We understand that the canal authority of the state has been brought under the state and county officers and employees retirement system; at least as to its employees. The fact that a state agency may deposit its money in a bank, instead of the state treasury, would not appear to be sufficient to exclude such an agency from the purview and operation of said §112.061, F. S. Likewise the fact that such agency may derive its funds from other than taxation would not appear to be sufficient to exclude it from the operation of the said section. See the opinion of Attorney General Landis of Oct. 8, 1936, (1935-1936 AGO 552) holding that funds received by the Florida board of forestry from the federal government and from landowners, in connection with forest fire protection, should be deposited with the state treasury instead of banking institutions, in the absence of statutory directions otherwise. Any statutory requirement that the board of directors of the canal authority shall "determine and prescribe the manner in which the corporation's obligations shall be incurred and its expenses al-

lowed and paid," would not seem to be in conflict with said §112.061, F. S.

The fact that the per diem allowed state officers and employees under and by said §112.061, if applied to the canal authority of the state, would result in a personal loss to such of said officers and employees, would be no different from general state officers and employees traveling to the same locations as do the officers and employees of the canal authority; often when state officers and employees travel to New York, Chicago, Washington, and other large cities, their per diem will not pay their hotel bill, leaving them in the red. Upon reconsideration of our opinion 061-141 of Sept. 12, 1961, we are of the opinion that the canal authority of the state, under the amendment made by Ch. 61-244, although referred to in the statutes as a corporation, is an agency of the state, and that its officers and employees are state officers and employees within the purview and operation of §112.061, F. S., and subject to the limitations therein contained. *We, therefore, adhere to our said opinion 061-141 of Sept. 12, 1961.*

We realize that our views expressed herein appear to be at variance with that of the authority's attorneys; this leads us to suggest that some proper legal proceeding be instituted by authority attorneys for a judicial determination of the question, or that legislation be sought to clarify the question.

062-161—December 17, 1962

**STATE PURCHASING
CONDITION DISCOUNT PROVISION AS FACTOR IN
DETERMINING LOWEST RESPONSIBLE BIDDER**

To: Ralph R. Siller, Executive Director, State Purchasing Commission, Tallahassee

QUESTION:

May the state or one of its agencies take into consideration, in determining the lowest responsible bidder, a condition discount provision contained in the payment terms of a bid?

An examination of your file accompanying your letter reflects that a supplier to a state agency offered a cash discount conditioned upon payment within 30 days.

A bid offered to a public agency containing a provision that the price offered is subject to a 2% discount if paid within 30 days does not act to render the bid price indefinite.

In AGO 060-169, wherein I advised the Hon. Thomas D. Bailey, superintendent of public instruction, that a state agency could not enter into a contractual obligation for the purchase of goods or materials when the price thereof was conditioned by a penalty clause, I also recognized that:

. . . It is permissible for the state or one of its agencies to take advantage of discounts for early or prompt payment. . . .

The use of a discount conditioned upon prompt payment has become a standard feature of commercial practice and when properly utilized can serve to afford to the state or its agencies a savings in the cost of goods and materials.

Unlike an escalator clause that permits the *seller* to determine the ultimate cost of the supplies purchased, a discount provision permitting a savings if the net price is paid within a stated period

of time places in the discretion of the *purchaser* the power to determine the lowest price offered.

If the agency involved is certain that it can comply with the condition, the bid to that agency is definite. The determination of the lowest responsible bidder under such circumstances, as in any situation, will depend upon the particular facts in each case.

If the agency involved was unable to comply with the discount condition and thus avail itself of the lower price, it, of course, could not accept such bid; however, the competitive bidding statutes should not be interpreted in such a manner as to deprive the state or its agencies of the privilege of a savings in cost because of the presence of a discount condition in a supplier's bid.

In conclusion, it is my opinion that the state or any of its agencies can consider a bid as a lowest responsible bid even though it includes a condition discount permitting a savings upon prompt payment where the agency involved is in a position to first determine that it is able to effectuate payment within the terms of the said condition discount.

The question as stated above is answered in the affirmative.

062-162—December 28, 1962

**COUNTY OFFICERS AND EMPLOYEES
VACATION AND TERMINAL PAY — EMPLOYMENT
TERMINATED BY DEATH — §125.01; CH. 129, F. S.**

To: *Harry A. Johnston, County Attorney, West Palm Beach*

QUESTIONS:

1. Is it legal for a county to pay from county public funds to the surviving spouse, or the estate, of a deceased county employee, compensation for and in lieu of such employee's accumulated and unused vacation time which he did not use during his lifetime?

2. Is it legal for a county to pay its employee compensation in lieu of his accumulated and unused vacation time upon separation from his employment?

3. Is it legal for a county to pay to a discharged employee two weeks salary beyond the actual date of services rendered?

"County commissioners are constitutional officers, not statutory officers, their powers and duties are only those which are prescribed by the constitution, or expressly conferred by statute, or necessarily implied to carry into effect the powers and duties expressly conferred. Where there is doubt as to the existence of authority, it should not be assumed." (8 Fla. Jur. 201-203, §56). The supreme court, in *Colen v. Sunhaven Homes, Inc., Fla.*, 98 So. 2d 501, text 503, said that "it is well settled that a county acting through its board of county commissioners is empowered to exercise only such authority as may be delegated to it under the constitution or by statutory grants . . . As such, counties occupy a position analogous to that of municipalities, being limited to and dependent upon, legislative enactment as the basis of their authority." From these authorities it appears that the powers and authority of boards of county commissioners are limited, and that they must stay within this authority, else their actions will be null and void.

The county commissioners are the general administrative

officers of the several counties and have control of the administrative and fiscal affairs of the counties respectively; they are required to make annual budget estimates and appropriations for the various county expenses, under Ch. 129, F. S. (See *Molwin Inv. Co. v. Turner*, 123 Fla. 505, 167 So. 33). County authority, such as laying out, constructing, maintaining, repairing, etc., of roads and highways; building and keeping county buildings in repair, and maintaining the same; caring for the poor and indigent; and otherwise caring for and protecting county property and carrying out county duties (See §125.01, F. S.) and performing and carrying out their other statutory duties, are such as may not be done, performed and carried out by the county commissioners personally and therefore must be done and carried out through employees, servants and agents. Even if there be no express authority for employing and procuring employees, servants and agents, there is implied authority to do so; how else could the said powers and duties be carried out?

Under Ch. 129, F. S., an annual county budget of expenditures is required for each county; this includes a general fund budget, a road and bridge fund budget, a fine and forfeiture fund budget, a capital outlay reserve fund budget and a bond interest and sinking fund budget. These budgets are required to have an itemized estimate of expenditures necessary to carry out all functions and activities of the county government. When the said budgets are adopted and become operative they "regulate the expenditures of the county . . . and the itemized estimates of expenditures shall have the effect of fixed appropriations." These appropriations are comparable to legislative budgets for state expenditures, and should receive a comparable construction. (*Adams v. Lott*, 112 Fla. 489, 150 So. 596). The law does not impose upon the county any obligations not authorized by statute or by the board of county commissioners acting within their authority. (See *Edwards v. Ocala*, 58 Fla. 217, 50 So. 421, text 423).

The reported cases are few bearing upon the obligation of a state, county or municipal corporation, to pay, or even incur, an obligation to pay the personal representatives of a deceased officer or employee a sum of money in lieu of an earned vacation period not taken before the death or separation of the officer or employee for service or employment. Our examination of these authorities leads to the conclusion that such payments may not be made unless provided for by statute or in valid employment contracts. (*State v. Chase*, 172 Wash. 243, 19 P. 2d 927; *Nicholson v. Amar*, 7 Cal. App. 2d 398; *Ann. in 134 A. L. R.* 195-205, and supplemental citations; *Ferguson v. U. S.*, 86 Ct. Cl. 606; *Green v. U. S.*, 85 Ct. Cl. 548; *Butler v. U. S.*, 47 Ct. Cl. 39; *Vaughn v. U. S.*, 45 Ct. Cl. 525; *Harrison v. U. S.*, 26 Ct. Cl. 259; *Connely v. State*, 44 N. Y. S. 2d 331).

Attention is directed to *Green v. Galvin*, Fla. App., 114 So. 2d 186, where the state comptroller was directed to draw a state warrant, payable to the personal representative of a deceased employee of the Florida industrial commission, representing the unused and accumulated vacation time of the deceased employee at the time of his death. Here the industrial commission had adopted a rule providing that "an employee who had resigned or who has been laid off or dismissed shall be entitled to and shall receive all accrued annual leave computed on the same basis as employees remaining in the service . . ." In the light of this rule the court held that when an employee of the commission was

separated from service, regardless of the cause, he is entitled to the money equivalent of his accrued leave. The employee's right was clearly dependent upon the above rule and regulation. This case did not discuss an employee's rights in the absence of such a rule.

From the above authorities we reach the conclusion that the right of a county employee in this state to compensation in lieu of accumulated vacation time is dependent upon a valid employment contract or statute or law so providing. We find no general statute or law, and know of no general rule or regulation, like or similar to the one involved in *Green v. Galvin*, supra, making provision for such payments in lieu of vacation time to county employees. We are not advised as to local statutes and laws bearing upon the question before us, or of long standing policies, rules or regulations of the several boards of county commissioners governing the question.

The answers to the above stated questions, in the absence of local laws, rules, regulations or long-standing policies, would appear to be in the negative. However, the answer in fact depends upon local statutes and laws, or long-standing policies, rules or regulations of the several boards of county commissioners governing the question.

062-163—December 28, 1962

PURCHASING BY STATE AGENCIES

REQUIREMENT OF COMPETITIVE BIDDING; TEACHERS' RETIREMENT SYSTEM, BOARD OF TRUSTEES—§§238.02, 238.01(2), 238.03, 287.081; CHS. 238 AND 287 F. S.

To: *Thomas D. Bailey, Superintendent of Public Instruction, Tallahassee*

QUESTIONS:

1. Is the teachers' retirement system operated under the teachers' retirement board or as a section of the state department of education?

2. Does the state purchasing council (cabinet) have the legal authority to approve the purchase of the higher price equipment without a recommendation from Ralph Siller?

3. Where there has been no determination by the executive authority of the teachers' retirement system that only Remington-Rand Lektrafiles manufactured by that particular manufacturer will meet the needs for which such item is to be used and where the director of such state agency has proposed lengthy specifications composed or designed solely for the purpose of eliminating competition other than Remington-Rand and where based thereon Remington-Rand submitted the only bid at a duly notified letting, may the state agency legally enter into a contract with the sole bidder?

Section 238.02, F. S., provides for a retirement system for Florida teachers and places said system under the management of a board of trustees.

Section 238.03(1), F. S., provides that the general administration and the responsibility for the proper operation of the retirement system and for making effective the provisions of this chapter are vested in the said board of trustees.

In Section 238.03(2), F. S., it is provided as follows:

The membership of the board of trustees shall consist of the state board of education and two members who shall be known as teacher members and who shall be appointed by the governor for terms of three years each. These appointees shall be teachers of distinction who shall have taught school for at least five years. (Emphasis supplied.)

In §238.01(2), F. S., it is provided that the "board of trustees" shall mean the board provided by §238.03 to administer the retirement system.

In the light of the above authorities it is clear that the administration of the "teachers' retirement system" is vested in the board of trustees created by Ch. 238, supra, and not in the state board of education, although a majority of the members of the board of trustees are also members of the state board of education.

The state purchasing commission is created by Ch. 287, F. S., and an examination of the said chapter reflects clearly that the authority to regulate purchases by state agencies is vested in the commission and not in its executive director. Although the commission should consider the recommendations of its director before taking formal action it is not bound thereby.

Question 2 is therefore answered in the affirmative.

In response to question 3, I would refer you to the provisions of §287.081, F. S., wherein it is provided as follows:

Purchases exceeding \$1000 to be made on bids.—No purchase shall be made where the purchase price thereof is in excess of \$1,000 unless made upon competitive bids received; and when the purchase price is in excess of \$2,000 no purchase shall be made unless competitive bids are received after advertising therefor in a newspaper of general circulation at least once a week for not less than two consecutive weeks prior to the date on which bids are to be received.

The only exemptions from the competitive bidding requirements of Florida law are emergency situations as contemplated by §287.081(1), F. S., and the circumstances set forth in §287.081(2), F. S., wherein it is provided as follows:

There is excepted from bid requirements purchasing agreements, contracts, and maximum price regulations executed or approved by the purchasing commission, also noncompetitive items available from one source only. In connection with the purchase of noncompetitive items only available from one source, a certification of the conditions and circumstances requiring the purchase shall be filed with the purchasing commission. Upon receipt of such certification the purchasing commission may, in writing, authorize the purchase. (Emphasis supplied.)

Your letter does not indicate that an emergency situation existed and you advise that the "executive authority" of the teachers' retirement system did not seek to invoke the provisions of §287.081(2), F. S., dealing with "noncompetitive items," by filing the certificate contemplated by said section. In view of the above it became the duty of the purchaser to seek competitive bids for the purchase of the equipment desired and to award the contract to the lowest responsible bidder.

You advise in your letter that the specifications prepared by the agency involved were "designed solely for the purpose of elim-

inating competition other than Remington-Rand;" and that the only bid tendered was from the above named company.

In my opinion 050-43 I advised the board of county commissioners for Highlands county that the mere fact that the specifications in question may have called for equipment regularly manufactured by only one company did not alone render the specifications void "if all the competition was permitted of which the situation allowed and the said specifications were not so cast with the intent of stifling competition and the product was such as is readily obtainable in the open market."

In that opinion I advised further that "if these specifications, along with others, have the clear effect of unduly limiting the field of possible competition they might be of questionable validity."

Recognizing that the question to be resolved depended upon the facts involved I advised the board that if they had any doubt as to the validity of their specifications, they should reject all bids and advertise for new bids in which they could eliminate specifications which had the effect of stifling competition.

In that opinion I pointed out that if there were other types of equipment available other than those specifically specified which would have been just as suitable for the work intended and just as convenient for the use, the validity of such specifications would be doubtful.

Although there exists some authority permitting a public agency the privilege of framing its specifications so as to permit it to buy a product produced by only one supplier where the purchase thereof would be in the best interest of the said purchaser, these same authorities recognize that such a requirement cannot be included in the specifications if the purpose or effect of same was simply to prevent or restrict the competitive bidding required by statutes. (See 20 C. J. S. Counties, §185; 63 C. J. S. Mun. Corp. §1149; Taylor v. County Board of Arlington County, 189 Va. 472, 53 S. E. 2d 34; 77 A. L. R. 702.)

In *Hinds v. Knight*, Fla., 59 So. 2d 634 the city of Miami requested bids for the purchase of incinerator equipment and received three bids in response to said request.

The award of the contract was challenged on several grounds, one being that the specifications involved called for a patented device under the sole control of the successful bidder.

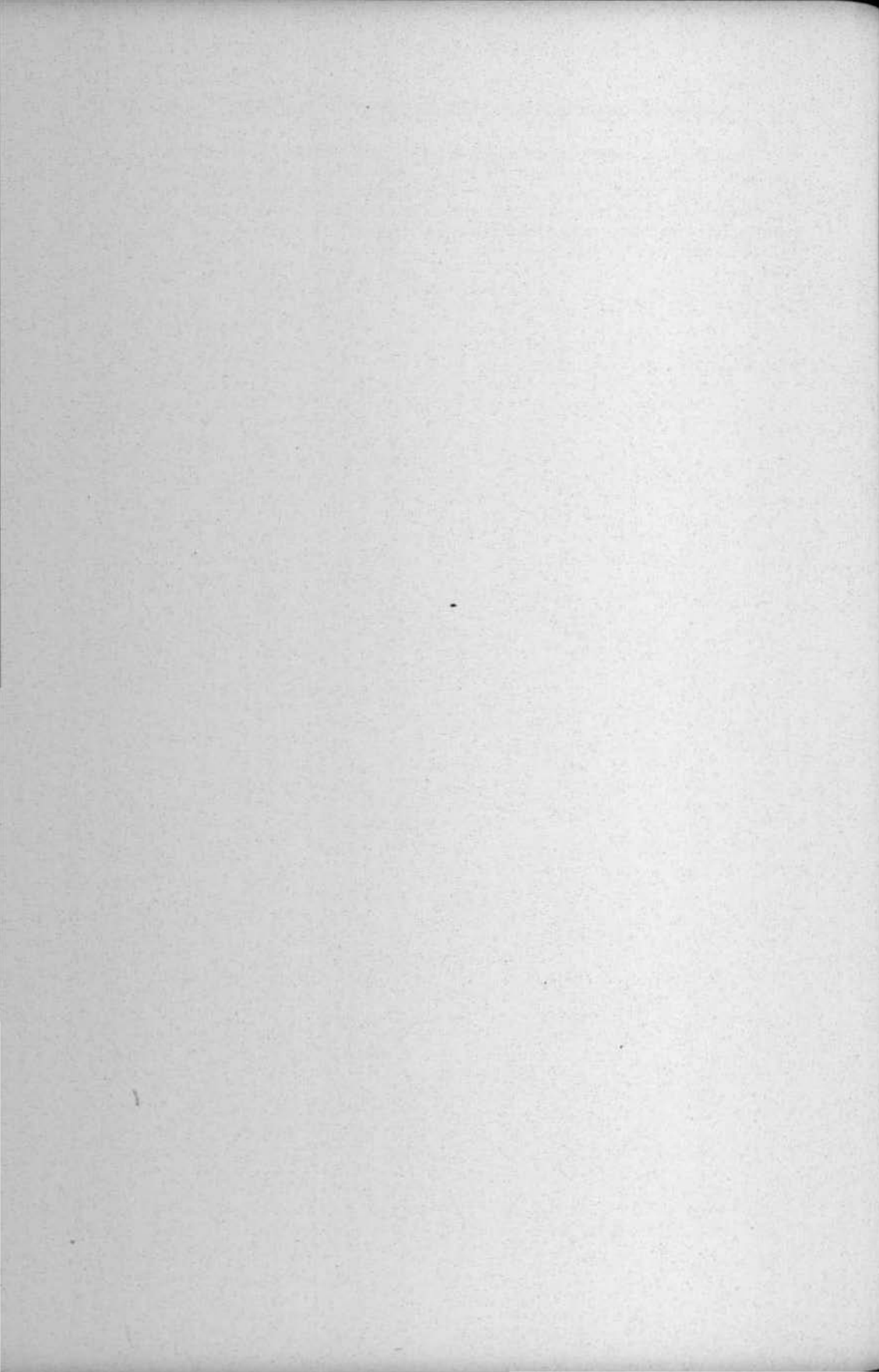
In holding that such a provision in the specifications did not render same invalid the court cited the case of *Taylor v. County Board*, supra, and concluded that the questioned provision did not serve to render competition impossible.

In the *Taylor* case cited by the Florida supreme court the Virginia court adopted an Iowa view and announced as follows:

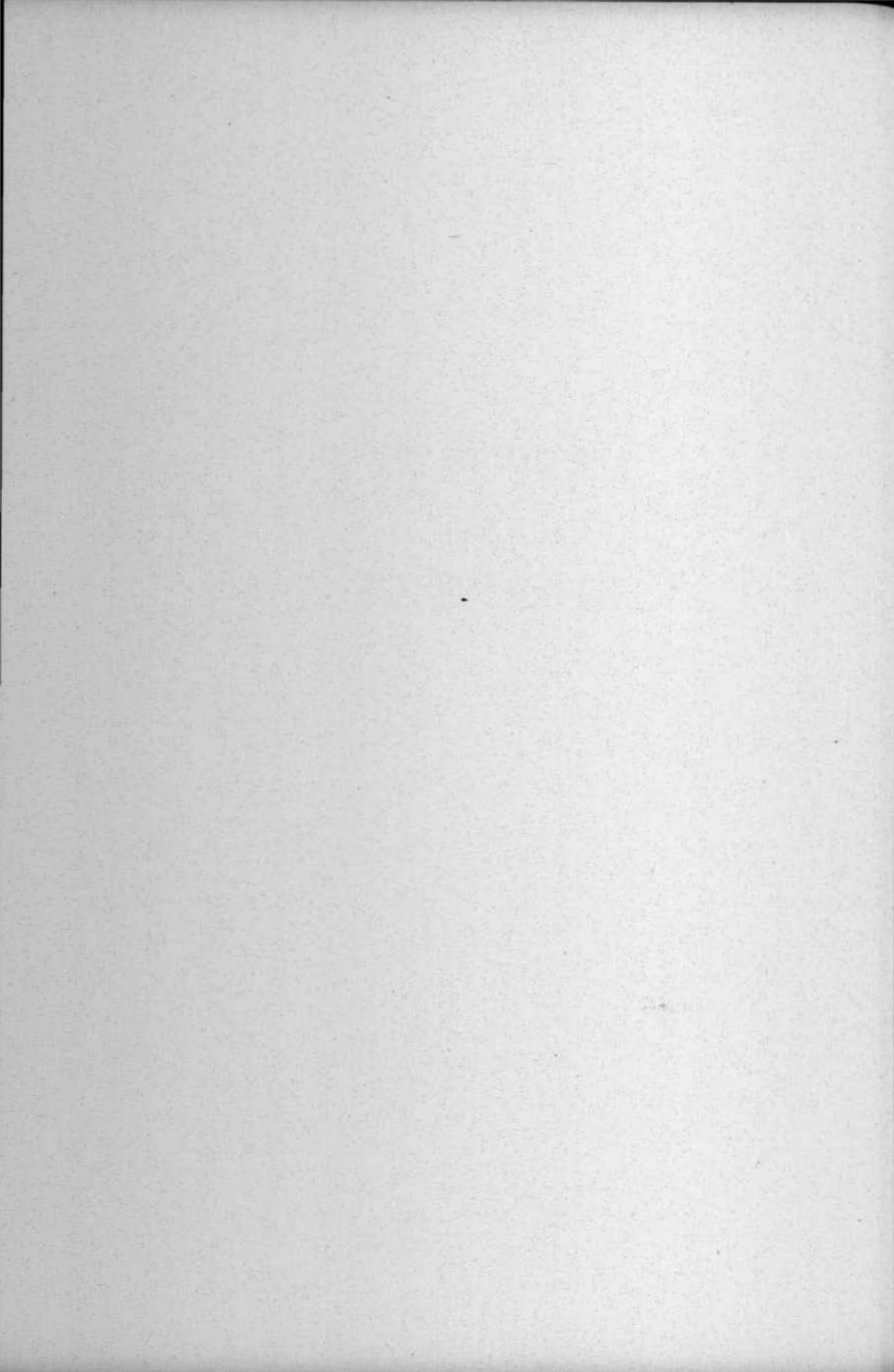
The court added that what was meant by the statute there under consideration was that "*there must be competition where competition is possible.*" See Ann., 77 A.L.R. 702, where it is said that the weight of authority appears to sustain the right of municipal authorities to designate a patented or monopolized material to be used for public improvements, *if it is not the purpose or the effect of the specifications to prevent or restrict the competitive bidding required by statute.* (Emphasis supplied.)

Thus, it would seem that specifications should be framed in such a manner so as to permit "competition where competition is possible" and same cannot have as their purpose or effect the prevention or restriction of competition.

In light of the above I must conclude that specifications framed so as to prevent or restrict competition and permitting only one bid where there exists other products adequate for the purchaser's needs are insufficient to meet the requirements of competitive bidding statutes. Therefore, question 3 as it is posed is answered in the negative.



**REPORTS
AND
STATISTICS**



1962 CONSTITUTIONAL AMENDMENTS

The 1961 regular session of the legislature adopted nine proposed amendments to the Florida Constitution. One, which proposed to amend Article VII relating to apportionment, was withdrawn by the extraordinary session convened in August, 1962. Said extraordinary session adopted House Joint Resolution 30-X which also proposed an amendment to Article VII. This proposed amendment was rejected at the 1962 general election.

Senate Joint Resolution 344 proposing an amendment to Section 6(2), Article V, relating to the number of circuit judges authorized for each judicial circuit, was also rejected at said general election.

The seven remaining proposed amendments adopted at the 1961 regular session were ratified at the 1962 general election and are set forth below:

PREAMBLE

We, the people of the State of Florida, being grateful to Almighty God for our constitutional liberty, in order to secure its benefits, form a more perfect government, insure domestic tranquility, maintain public order, and guarantee equal civil and political rights to all, do ordain and establish this constitution.

History.—Am. H.J.R. 1966, 1961; adopted 1962.

BOUNDARIES

ARTICLE I

The state boundaries are: Begin at the mouth of the Perdido River, which for the purposes of this description is defined as the point where latitude 30° 16' 53" north and longitude 87° 31' 06" west intersect; thence to the point where latitude 30° 17' 02" north and longitude 87° 31' 06" west intersect; thence to the point where latitude 30° 18' 00" north and longitude 87° 27' 08" west intersect; thence to the point where the center line of the Intracoastal Canal (as the same existed on June 12, 1953) and longitude 87° 27' 00" west intersect; the same being in the middle of the Perdido River; thence up the middle of the Perdido River to the point where it intersects the south boundary of the State of Alabama, being also the point of intersection of the middle of the Perdido River with latitude 31° 00' 00" north; thence east, along the south boundary line of the State of Alabama, the same being latitude 31° 00' 00", north to the middle of the Chattahoochee River; thence down the middle of said river to its confluence with the Flint River; thence in a straight line to the head of the St. Marys River; thence down the middle of said river to the Atlantic Ocean, and extending therein to a point three geographic miles from the Florida coast line, meaning the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters; thence southeastwardly following a line three geographic miles distant from the Atlantic coast line of the state and three leagues distant from the Gulf of Mexico coast line of the state to and around the Tortugas Islands; thence northeastwardly, three leagues distant from the coast line, to a point three leagues distant from the coast line of the mainland; thence north and northwestwardly, three leagues distant

from the coast line, to a point west of the mouth of the Perdido River, three leagues from the coast line, as measured on a line bearing $0^{\circ} 01' 00''$ west from the point of beginning; thence along said line to the point of beginning.

The legislature may extend the coastal boundaries to such limits as the laws of the United States or international law may permit.

History.—Am. H.J.R. 1965, 1961; adopted 1962.

DIVISION OF POWERS

ARTICLE II

The powers of the government of the State shall be divided into three departments: Legislative, Executive, and Judicial. No person properly belonging to one of these departments shall exercise any powers appertaining to either of the other departments, except in cases expressly provided by this constitution.

History.—Am. H.J.R. 1996, 1961; adopted 1962.

LEGISLATIVE DEPARTMENT

ARTICLE III

SECTION 29. Impeachment of officers.—The House of Representatives shall have the sole power of impeachment. The speaker of the House may appoint a committee to investigate alleged grounds for impeachment against any officer subject to impeachment either during or between legislative sessions; but a vote of two-thirds of all members present shall be required to impeach any officer; and all impeachments shall be tried by the Senate. When sitting for that purpose the senators shall be upon oath or affirmation, and no person shall be convicted without the concurrence of two-thirds of the Senate present. The Senate may adjourn to a fixed time for the trial of any impeachment, and may sit for the purpose of such trial whether the House of Representatives be in session or not, but the time fixed for such trial shall not be more than six months from the time articles of impeachment shall be preferred by the House of Representatives. The Chief Justice shall preside at all trials by impeachment except in the trial of the Chief Justice, when the Governor shall preside. The Governor, Administrative officers of the Executive Department, Justices of the Supreme Court, and Judges of the Circuit Court shall be liable to impeachment for any misdemeanor in office, but judgment in such cases shall extend only to removal from office and disqualification to hold any office of honor, trust or profit under the State; but the party convicted or acquitted shall nevertheless be liable to indictment, trial and punishment according to law.

History.—Am. H.J.R. 1730, 1961; adopted 1962.

JUDICIAL DEPARTMENT

ARTICLE V

SECTION 9A. Additional judge, Duval county criminal court of record.—

On and after the first Tuesday after the first Monday in January, 1965, the State Attorney of the Fourth Judicial Circuit shall be the prosecuting attorney of the Criminal Court of Record of Duval County, Florida, and the office of County Solicitor, the

position of Assistant County Solicitor, the position of Special Investigator for the County Solicitor in Duval County, shall stand abolished and terminated; and thereafter the State Attorney and his Assistant Attorneys, under his direction, shall perform all the duties and functions of office heretofore performed by the County Solicitor. Pending informations filed in the Criminal Court of Record shall not be invalidated hereby, and the State Attorney, or his Assistant State Attorneys, may file amended informations in any such cases if and when necessary. The Legislature may provide for Assistant State Attorneys and Special Investigators for the State Attorney of The Fourth Judicial Circuit, and all Assistant State Attorneys of said Fourth Judicial Circuit shall be appointed by the State Attorney and sworn in by the Court, and such Assistant State Attorneys shall work under the direction of the State Attorney and shall have full authority to do and perform any official duties and acts that the State Attorney may do and perform within said Fourth Judicial Circuit.

Upon this amendment being adopted all funds appropriated by law approved by the Budget Commission and budgeted by the Board of County Commissioners of Duval County, Florida, and for the purpose of employing Assistant County Solicitors and other office personnel shall thereafter be used for the operation of the State Attorneys office of the Fourth Judicial Circuit, and for the employing of Assistant State Attorneys and other personnel, of that office, and the State Attorney is hereby authorized to employ such personnel, including Assistant State Attorneys and investigators in the same number and to be paid the same salary as the number of Assistant County Solicitors and investigators employed by the County Solicitor of Duval County, Florida.

History.—Am. S.J.R. 218, 1961; adopted 1962.

EDUCATION ARTICLE XII

SECTION 2B. County superintendent of public instruction; appointment in certain counties.—

(1) The county superintendent of public instruction shall be appointed by the county board of public instruction in the counties of Alachua, Charlotte, Collier, Manatee, Orange, Lee, Monroe, Leon, Indian River, St. Lucie, Broward, Baker, Brevard, Hendry and Hillsborough wherein the proposition is affirmed by a majority vote of the qualified electors of any such county making the office of county superintendent of public instruction appointive.

(2) The board of public instruction of the county must request an election, which may be a special election or may be on the ballot of any regular primary or general election to be designated by the board of public instruction, and upon such timely request the board of county commissioners of such county will call such special election or cause to be placed on the ballot at such other election the proposition whether subsection (1) shall be effective in such county.

(3) Any county adopting the provisions of subsection (1) hereof may after four years return to its former status and reject the provisions of this section by the same procedure outlined

in subsection (2) hereof for adopting the provisions thereof in the beginning.

History.—Com. Sub. for H.J.R. 1443, 1961; adopted 1962.

MISCELLANEOUS PROVISIONS

ARTICLE XVI

SECTION 4E. Civil Jury Trials in Pasco County; location in certain branch court houses within said county.—The legislature may, from time to time, and as the business of Pasco County may require, provide that trial by jury of all civil suits, properly triable by jury according to law, may be had and held in addition to the county seat in any branch court house, within said county. The legislature may provide also that the clerk of any court or any other court officer, within said county, shall maintain such offices within such municipality and have available such official books and records therein, as may be necessary to accomplish the purposes of this amendment; provided, however, that the principal offices of such clerks or other officers shall not be removed from the county seat.

History.—H.J.R. 1853, 1961; adopted 1962.

CONSTITUTIONAL AND STATUTORY DUTIES OF ATTORNEY GENERAL

The attorney general in Florida derives his office from the people. He is elected by popular choice and acquires his powers and authority and is charged with the duties of his office from three primary sources: First, the common law; second, the Constitution of Florida; third, the statutory law.

Judicial decision, interpretation and construction enter the picture by way of defining, declaring and designating this authority and these duties within the common law, constitutional and statutory, grant and limitation.

COMMON LAW POWERS, DUTIES AND AUTHORITY

He is as much the representative of the State of Florida in the supreme court, as the King's Attorney General in his representative in the Court of King's Bench. It is his sole duty to appear in and attend to, in behalf of the state, all suits or prosecutions, civil or criminal, or in equity, in which the state may be a party, or in anywise interested, in the supreme court of this state. At common law his office is in many respects judicial in character and he is clothed with considerable discretion. If the power exists, it is not a question of right in him to institute the necessary proceeding when in his opinion a condition exists which requires the exercise of the power, it is a matter of duty. At common law it is his duty to prosecute all actions necessary to protect state's property and revenue, to represent the state in all criminal cases before the appellate court; to revoke and annul grants made by the state improperly or when forfeited by the grantee; to determine the right of anyone who claims or usurps any office; to vacate the charter or annul the existence of a corporation for violations of its charter or for omitting to exercise its corporate powers; to enforce trusts; to prevent public nuisances; and in the absence of express legislative restrictions, to exercise all such

power and authority as public interest may require. State ex rel Landis, Attorney General, et al v. S. H. Kress & Co., 115 Fla. 189, 155 So. 823.

CONSTITUTIONAL POWERS, DUTIES AND AUTHORITY

Article IV, Section 22 of the Constitution of Florida, provides as follows: "The Attorney General shall be the legal advisor of the Governor and of each of the Officers of the Executive Department, and shall perform such other legal duties as may be prescribed by law. He shall be Reporter for the Supreme Court." The full import of this constitutional field of duty has never been defined by the supreme court of Florida. Courts of other states have gone very far in their application of similar provisions in the charge of legal duty, responsibility and field of legal representation held to belong to the office.

STATUTORY POWERS, DUTIES AND AUTHORITY

In addition to his common law and constitutional powers, duties and authority, the attorney general has the following general and regular statutory powers, duties and authority, to:

1. Appear in and attend to suits or prosecutions in any of the courts of the state or in any courts of any other state or of the United States in behalf of the state of Florida (§16.01).

2. Give his official opinion and legal advice in writing on any matter touching their official duties, upon the written requisition of the governor, secretary of state, treasurer, comptroller or superintendent of public instruction (§16.01, F. S., and §22, Art. IV, Fla. Const.).

3. Exercise all powers and perform all duties incident to such office and to make and keep in his office a record of all official acts and proceedings, such record to contain copies of his opinions (§16.01, F. S., and §27, Art. IV., Fla. Const.).

4. Make a written report on the effect and operation of the acts of the last previous legislative session, and the decisions of the court thereon, to the governor, five days before the first day of every session of the legislature (§16.05).

5. Report to each session of the legislature such legislation as he may deem advisable concerning defects in laws.

6. Exercise general superintendence and direction over the several state attorneys (§16.08).

7. Direct and be in charge of the statutory revision department, which also includes legislative bill drafting (§§16.43, 16.44, 16.46-16.48, 16.50, 16.51).

8. Prepare alphabetical indexes for the journals of the legislature and in this connection employ competent indexers who shall be attaches of the legislature and paid as other attaches are paid (§16.44).

9. Participate with other states in preserving the constitutional integrity of the state (§16.52).

10. Approve the bond of the comptroller (§17.01).

11. Act as legal adviser to the state auditing department (§21.091).

12. Act as emergency successor to governor's office (§22.04).

13. Report to legislature on conference of circuit judges (§26.55).

14. Represent juvenile court in certiorari proceedings (§39.14(12)).

15. Represent the state treasurer in connection with claims for funds deposited with him by receivers, trustees, legal representatives and other fiduciaries (§69.07).
16. Conduct condemnation proceedings on behalf of the board of commissioners of state institutions and on behalf of the adjutant general's office for military purposes (§73.22).
17. Conduct quo warranto proceedings (§80.03).
18. Represent the state in proceedings under the declaratory judgment law where the constitutionality of statutes is involved (§87.10).
19. Devise a suitable seal for the supervisors of registration (§98.341).
20. Examine audited reports of state executive committee and file same as public record (§103.121).
21. Report and turn over to state treasurer all perquisites fixed by law accruing from administration (§111.02).
22. Approve title to real estate in which the state is interested (§135.16).
23. Represent the state in tax lien foreclosure proceedings by municipalities involving Murphy act lands (§196.21).
24. Assist in the collection and enforcement of retail store license taxes (§204.13).
25. Assist in enforcing law in sales of businesses (§212.10 (2)).
26. Introduce proceedings to collect defaulted investments and otherwise protect state funds invested (§215.46).
27. Take necessary action on appeals by board of public instruction regarding pupil assignment law (§230.232 (3) (c)).
28. Prepare contracts for purchase of uniform school books (§233.16).
29. Approve school district bonds (§236.48).
30. Prosecute violations of school budget law (§237.23).
31. Act as legal adviser to board of trustees of the teachers' retirement system (§238.03 (9)).
32. Represent board of control in eminent domain proceedings (§240.14).
33. Conduct procedure for and act as counsel for board of commissioners of state institutions in condemnation of property as provided in §242.55 (2) (§242.58).
34. Act as legal adviser and representative of the board of trustees of the Florida state fire college (§242.61).
35. Approve bonds given by institutions receiving bodies to anatomical board (§245.14).
36. Conduct condemnation proceedings on behalf of the armory board (§250.40).
37. Act as ex officio member and legal adviser of the state civil defense counsel (§252.05).
38. Pass upon and approve regulations of district drainage board (§298.53).
39. Act as legal adviser for the state road department. (Said department, however, has a special attorney authorized by statute.) (§334.18).
40. Act as attorney for the railroad and public utilities commission (this work is negligible because of the fact that the railroad and public utility commission has authority to employ its own special counsel) (§§350.29, 350.30, 350.31, 350.62, 350.66).
41. Assist railroad and public utilities commission in making

investigations relating to the regulation of private wire service (§§365.06, 365.07).

42. Attend to all legal business arising in connection with the laws governing the salt water fishing industry and state board of conservation (§370.02(8)).

43. Represent the state in all appeals from judgment of forfeiture to the supreme court (§372.316).

44. Enforce the vital statistics law (§382.37).

45. Bring suits to collect expenses for mentally ill or insane persons (§394.21).

46. Represent hospital licensing agency (§395.16).

47. Approve form of state treasurer's bond (§443.10).

48. Represent the state in proceedings to suspend or revoke licenses of labor union business agents (§447.10).

49. Represent the state in disbarment proceedings in the supreme court (§454.28).

50. Assist in the enforcement of the basic science law (§456.22).

51. Institute proceedings in the name of the state for the purpose of recovering moneys due the state from any medical scholarship recipient (§458.083).

52. Assist in the enforcement of laws regulating the practice of optometry (§463.19).

53. Institute proceedings in the name of the state for the purpose of recovering moneys due the state from any dental scholarship recipient (§466.45).

54. Represent the state board of architects in judicial proceedings to which the board may be a party. However, the board is authorized by statute to secure other legal advice or service (§467.14).

55. Approve the form for bonds of nonresident outdoor advertisers (§479.06).

56. Act as legal adviser to the state board of dispensing opticians (§484.08).

57. Act as legal adviser and represent watchmakers commission in all courts and in all legal matters affecting commission (§489.10).

58. Assist in the enforcement of the laws regulating the sale of milk, cream and milk products (§502.26).

59. Assist in the enforcement of laws regulating small loan businesses (§516.23).

60. Pass upon permits of associations doing business under a declaration of trust (§§517.03, 609.05).

61. Assist in enforcement of law regulating sale of liquid fuels (§526.10).

62. Investigate and rectify commercial discriminations (§§540.02-540.05).

63. Investigate contracts obstructing competition in violation of fair trade law (§541.09).

64. Enforce the anti-trust laws of the state (§542.03).

65. Bring proceedings to forfeit charters of corporations which violate the laws or fail to comply with mandatory requirements of same (§§542.03, 542.04, 542.09).

66. Prosecute combinations against Florida meats (§544.02).

67. Bring proceedings against combinations in restraint of motor vehicle financing (§545.08).

68. Act as attorney for the state racing commission. (Said

commission, however, has statutory authority to employ its special counsel) (§550.01).

69. Represent state in all appeals from judgments of forfeiture (§562.404).

70. Act as counsel for the department of agriculture (§570.10).

71. Bring proceedings against fair associations for annulment of their charters when laws relating to same are violated (§§615.11, 616.09).

72. Bring proceedings, under certain conditions, for annulment of franchises of social clubs (§617.09).

73. Bring proceedings, under certain conditions, to annul franchises of corporations not for profit (§617.09).

74. Institute and prosecute to final judgment such legal or equitable proceedings as may be advisable to revoke permit, prevent its improper use or prevent foreign corporation from exercising corporate powers within state (§§617.022 and 617.11).

75. Bring proceedings to test the validity of the incorporation of cooperative marketing associations and nonprofit cooperative associations (§§618.23, 619.09).

76. Sue to recover fines for doing business without a license (§625.17).

77. Conduct prosecutions against defaulting and delinquent surety companies (§626.08).

78. Conduct proceedings against insolvent or defaulting insurance companies (§§626.08, 626.12).

79. Represent the insurance commissioner in connection with insurance matters (§637.54).

80. Assist in fixing values of securities deposited with the state treasurer by trust companies under the trust law (§660.08).

81. Bring proceedings to recover escheated property (§731.33).

82. Institute proceedings in appropriate court for declaratory judgment to determine whether printed matter is obscene (§847.01).

83. Bring proceedings to forfeit prize money in lotteries (§849.12).

84. Represent state in all appeals from judgments of forfeiture of gambling devices to the supreme court (§849.42).

85. Enforce laws regarding subversive activities (§§876.22-876.31).

86. Conduct extradition hearings for the governor (§941.04).

87. Act as attorney for the parole commission (§947.11).

88. Act as legal adviser to department of corrections (§944.52).

89. Furnish legal services to division of mental health (§965.01).

90. Furnish legal services to board of commissioners of state institutions in their protection of financial interests of the state with respect to claims for care and maintenance of patients of state institutions (§965.08).

MEMBERSHIP IN BOARDS, COMMISSIONS AND COUNCILS

The attorney general is a member of the following state boards, commissions and councils:

1. Board of commissioners of state institutions (§17, Art. IV, Fla. Const.).

2. State board of education (§3, Art. XII, Fla. Cont., §229.15).

3. Interstate cooperation commission (§13.05).

4. Trustees of internal improvement fund (§253.02).
5. State board of drainage commissioners (§298.69).
6. State budget commission (§216.01).
7. State board of conservation (§370.02(1)).
8. State board of pardons (§12, Art. IV., Fla. Const.).
9. State canvassing board (§102.111).
10. Florida securities commission (§517.03).
11. Railroad, etc., assessment board (§195.01).
12. Board of fixing values of investment securities of trust companies (§660.08).
13. Board for supervision and regulation of forms to be used for assumption of risks by surety companies (§648.16).
14. State housing board (§424.04).
15. Department of public safety executive board (§321.01).
16. State board for vocational education (§229.08(9)).
17. State board of trustees of teachers' retirement system (§238.03).
18. State textbook purchasing board (§233.13).
19. State purchasing commission (§287.031).
20. Member of state civil defense council (§252.05).
21. Governor's cabinet (§20, Art. IV, Fla. Const.).
22. Judicial council (§43.15).
23. State merit system personnel board (§110.02).
24. Sheriff's bureau (§30.36).
25. Board of appeals of county officers' budgets (§30.49).
26. Public records screening board (§119.04).

STATUTORY REVISION DEPARTMENT

The 1943 legislature created a permanent statutory revision, legislative, drafting and reference department, which is designated and known as the statutory revision department, under the direct supervision and control of the attorney general (§§16.43 et seq., F. S.). The powers, duties and functions of the said statutory revision department are set out in full in the foregoing cited statutes.

In compliance with the foregoing statutes, the statutory revision department was set up and developed, as a department, in the office of the attorney general and under his direct supervision and control. The work of the said statutory revision department is now carried on under the following plan and system.

Continuing plan of operation—The statutory revision department operates, as directed under the statutes (see §§16.19-16.24, 16.27, 16.43, 16.44, 16.46-16.48, 16.50, 16.51, F. S.), to the fullest extent and according to the intent and purpose of said statutes, its work being carried forward in a continuous manner and in the following objective classification:

(1) Continuing a systematic study of general statutes and laws for the purpose of reducing bulk, removing inconsistencies, eliminating redundancies and surplusages, correcting mistakes in grammar, punctuation, language, etc., combining and consolidating duplicate laws and otherwise performing the revisory function contemplated in the law and providing for said revision by reviser's bills to be submitted to each session of the legislature.

(2) Carrying on the arrangement and identification of the general statutes and laws of this state as adopted in Florida

Statutes, by adding, in the proper place, all new matter belonging therein; this material is compiled, revised and published biennially and adopted by each session of the legislature as the official Florida Statutes.

(3) Indexing each of the journals of the two branches of the legislature.

(4) Preparing and having printed from time to time pamphlets, special indexes and other materials relating to statutes and laws; securing copyrights and republishing when necessary.

(5) Carrying on a continuous reworking of the general index to the Florida Statutes in order that said index may be improved with each biennial publication.

(6) Indexing the general laws of each legislative session that are to be incorporated in the Florida Statutes. This material is indexed in the light of the existing general index so that the new material will fit into the existing pattern of said general index.

(7) Making a complete biennial revision of the general statutes and laws of this state to conform with the numbering system, style, contents and other characteristics of the Florida Statutes.

(8) Maintaining a bill drafting department for the benefit of the members of the legislature and the state officials, boards and agencies.

(9) Maintaining a legislative reference library in conformance with legislative authorization.

(10) Preparing, compiling and having printed such handbooks, and other publications of the attorney general as may be required by law or that in the opinion of the attorney general is deemed advisable.

(11) Assisting other state departments, bureaus and agencies in compiling laws affecting their activities and operation, and lending such assistance as may be required in having such compilations printed in proper form.

(12) Maintaining contacts with similar departments in other states, and with lawbook publishing companies and editors who show a tendency to cooperate and exhibit an interest toward the mutual betterment and advancement of work in this field.

Preservation of type used.—All type used in printing publications of the statutory revision department is required by law to be preserved, and is stored and protected by adequate insurance in conformity with such law.

Selection and supervision of personnel.—Personnel is selected and maintained according to the best talent available, and the work of the department is assigned and distributed to the personnel in such manner as to secure the best results, giving consideration to the particular talents of each person. Generally, however, responsibility is divided as follows:

(1) General supervision and control is under the attorney general, who, under authority of §16.43, F. S., selects a director. The director has the direct supervision and control of the department, and with the advice of the attorney general selects and employs the operating personnel and fixes their compensation.

(2) Principal study of the statutes, revisions and preparation of reviser's bills is under the supervision of the director.

(3) Indexing and continuous study and revision of index material is by a qualified indexer who is under the administrative supervision of the director.

(4) Related work is kept up to date under the supervision of the director.

(5) Proofreading and checking is carefully and meticulously done by qualified persons.

(6) Stenographic and clerical work is performed by accurate and careful stenographers and clerks.

(7) Bill drafting and research between and during sessions of the legislature is done by such members of the department and the attorney general's office as may be qualified for such work, under the direction of the attorney general originally and upon recommendation and advice of the director.

The reviser's bills, as provided by statute, are prepared by the director and the department under his direction. The principal objectives of the reviser's bills are to correct, amend, consolidate, revise, repeal or otherwise immaterially alter or change any general statute or law, or parts thereof, of a general nature and application which may appear to be subject to revision but without changing substance, or altering operation and effect. They do not deal with:

(1) Statutes relating to or concerning one or more counties or municipalities, or parts thereof, except in certain cases where the subject matter relates to the creation or jurisdiction of state, county or municipal courts.

(2) Statutes relating to, concerning, or that would be operative in only a portion of the state, except in cases where the subject matter relates to the creation of jurisdiction of state or county courts.

(3) Statutes relating to or concerning only a certain municipal corporation.

(4) Statutes relating to or concerning one or more designated individuals or corporations.

(5) Statutes incorporating a designated individual corporation or making a grant thereto.

(6) Road designation laws.

The omission of any statute coming within the classifications aforesaid is properly accounted for in the tables or indexes.

In the compilation of material and the drafting of reviser's bills, the following rules and procedures are adhered to:

(1) A continuing and systematic study of the statutes is carried on.

(2) A careful search is made for:

(a) Inappropriateness of run-in lines to sections.

(b) Misspelled words and poor punctuation.

(c) Statutes limited as to time of operation and which have expired.

(d) Sections, or parts of sections, that conflict with, or the operation of which is inconsistent with, the logical operation of other sections.

(e) Laws that have become obsolete.

(f) Sections that are so poorly written that the meaning is not clear or that may be subject to more than one interpretation.

(g) Sections containing lengthy and superfluous matter that may be rewritten for the sake of brevity.

(h) Sections that are poorly or incorrectly phrased in their reference to other parts of the statutes, or otherwise.

(i) Sections that, because of amendments and additions to

the statutes, should be renumbered and placed in different sequence.

(j) Sections, or parts of sections, that have been constructively repealed or made inoperative by other laws.

(k) Conflicting powers and duties of officials.

(l) Repetitious statutes.

The department carries continuing history notes on each section of the statutes; maintains a running file containing a list of errors, suggestions, etc., that are submitted by members of the Florida Bar; and maintains a system of keeping comprehensive notes and data for the final preparation of the reviser's bills. In the preparation of reviser's bills, sections containing new material to be added or for the purpose of replacing existing sections are written with due regard to brevity, using as plain and modern language as possible and simple rather than complex words and phrases, with due regard to correct punctuation, avoiding verbosity and repetitions.

Each reviser's bill is accompanied by complete explanatory memos.

Printing.—Departmental printing is advertised and bids received for it according to the requirements of law. In addition, invitations to bid are mailed with copies of specifications, to all qualified printers within the state. Specifications are made up as simply as possible, with due regard for the insurance of a first-class product and for the protection of the state. Specifications are made up with a view toward economy, without sacrificing quality. General specifications and requirements are compiled and used so far as possible in the contracts for printing. Wide variance in style and form from that presently used is avoided.

**COMPILED STATEMENT OF CASES HANDLED,
OPINIONS AND MISCELLANEOUS LETTERS
WRITTEN IN THE ATTORNEY
GENERAL'S OFFICE**

(From Jan. 1, 1960 through Dec. 31, 1961)

CRIMINAL CASES

January 1, 1961—Cases pending	187
1961—New cases—Tallahassee—177 (Tampa 10)	
Miami — 22	
Lakeland — 61	
1961 Habeas corpus	147
1962—New cases—Tallahassee—206	
Miami — 114	
Lakeland — 95	
1962—Habeas corpus cases	235
	1,057
Total	1,244
Closed cases—1961	—222
Closed cases—1962	—264
Closed habeas corpus cases	—382
(1961-1962)	
	868
January 1, 1963—Cases pending	323

CIVIL CASES

January 1, 1961—Cases pending	444
1961—New cases—Tallahassee—192	
Miami — 66	
1962—New cases—Tallahassee—262	
Miami — 37	
Total	557
	1,001
Closed cases—1961	—161
Closed cases—1962	—257
	418
	418
January 1, 1963—Cases pending	3
1961—Miscellaneous letters—14,864	1961—Approved 507
1962—Miscellaneous letters—16,462	1961—Rejected 47
Total	31,326
	1962—Approved 516
	1962—Rejected 72
	Total 1,142

1961—Opinions—205

1962—Opinions—163

Total 368

1961—Subjects—323

1962—Subjects—299

Total 622

STATUTORY REVISION

1961 Total letters 11,258

1962 Total letters 12,171

Grand Total 23,429

WEEKLY MAILING LIST

1961-1962 Opinions 56,008

1961-1962 Digest 39,000 ,

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PORTED IN 1961-1962**

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